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IN THE

Supreme Court of the United States

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION,
owner or owner *pro hac vice* of Barges 1011,
1384, 1400, 1363, and others in a fleet,
Petitioner,

vs.

HOWARD E. PFEIFER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

I. Did the Lower Courts err in ruling that the plaintiff had a valid cause of action against his employer under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act?

II. Did the Lower Courts err in applying the law of the Commonwealth of Pennsylvania, specifically the case of *Kaczkowski vs. Bolubasz*, to a case filed under a federal statute, determining the proper measure of damages?

III. Did the Lower Courts err in not applying, as a set-off to plaintiff's damages, the wages introduced by the defendant for light duty work, without first determining who has the obligation to offer work or mitigate damages?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Jones & Laughlin Steel Corporation, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on April 16, 1982.

Opinions Below

The opinion of the Court of Appeals (App A, *infra*, 1a-16a) has not yet been reported. The opinion of the District Court (App. B, *infra*, 27a-44a) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals (App. A, *infra*, 17a) was entered on April 16, 1982. A *sur* petition for rehearing *en banc* was denied on May 20, 1982, with Judge Adams joined by Judge Hunter dissenting (App. A, *infra*, 21a). The certified judgment in lieu of formal mandate was issued on May 28, 1982 (App. A, *infra*, 23a). Appellant's motion for stay of mandate filed on June 2, 1982 was treated as a motion to recall the mandate. The motion was granted and the mandate recalled by Judge Aldisert on June 8, 1982 (App. A, *infra*, 25a).

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Statutory Provisions Involved

1. 33 U.S.C.A. §905

> (a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such

action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such persons was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

2. 33 U.S.C.A. §933

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an

employee where he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

Statement of the Case

Howard E. Pfeifer, respondent, instituted this third party negligence action in the District Court alleging jurisdiction on the basis of Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).

Respondent was employed by Jones & Laughlin (J&L) as a landing helper, working on J&L's coal barges. On January 13, 1978, respondent suffered injuries when he fell on the gunnel of the barge while carrying a motor and breaker box for use in pumping out barges.

Respondent never returned to work after the incident and, at the time of trial, was on a disability pension from J&L for physical impairments which had nothing to do with the incident of January 13, 1978. Pfeifer made a claim for and received payments within the terms of the LHWCA. He then filed the instant negligence action against J&L as the employer vessel owner *pro hac vice* of the barge.

The District Court determined that petitioner, as a vessel owner *pro hac vice*, was liable for negligence under §905(b) of the LHWCA, rejecting petitioner's argument that §905(a) precludes an employer's third-party liability where the employer has secured payment of compensation in compliance with §904 of the LHWCA, 33

U.S.C.A. §904. The District Court also held that the recent Pennsylvania Supreme Court case of *Kaczkowski vs. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), dictated that the damages for lost future earnings not be discounted to present value. Finally, the District Court held that damages for future earnings should be factored on the basis of the minimum wage rate instead of wages for light duty work. In reaching this conclusion, the Court rejected petitioner's argument that there is no logical reason why J&L should have been required to offer a light duty position to respondent when the facts adduced at trial showed that respondent was totally disabled and the disability was unrelated to the incident of January 13, 1978.

The Third Circuit Court of Appeals affirmed all three questions on appeal. The appeals court rejected petitioner's §905(b) LHWCA argument on the basis of the holdings in *Griffith vs. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976), and *Reed vs. The Yaka*, 373 U.S. 410 (1963). Likewise, the appeals court rejected petitioner's argument that lost future wages be discounted to present value. And although the Court stated that the holding in the Lower Court was limited to the proper federal measure of damages, it stated later in the opinion that it could find no jurisprudential impediment to the adoption of Pennsylvania's measure of damages. Finally, the Court concluded that the District Court's set-off based on the minimum wage rate was not "clearly erroneous" under the standard of Fed.R.Civ.P. 52(a).

The Court of Appeals denied petitioner's *sur* petition for rehearing on May 20, 1982, and a certified judgment in lieu of mandate was issued on May 28, 1982. Peti-

tioner's motion for stay of mandate was treated as a motion to recall the mandate. Judge Aldisert granted the motion and recalled the mandate in order to allow petitioner the opportunity to petition this Court for writ of certiorari.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully submits that all three issues passed upon by the Courts below present important questions of federal law which have not been, but should be, settled by this Court. Accordingly, the reasons and arguments for the allowance of the writ are treated separately for each issue below.

I. The courts of appeals are sharply divided and Congress' intent unclear concerning §905(b) third-party negligence actions against employer-vessel owners under the 1972 amendments.

Four circuits have ruled or indicated in dicta that §905(b) affords an injured employee a cause of action in negligence against the vessel owner, even though the owner is also the employer. *Napoli vs. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Griffith vs. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed. 2d 643 (1976); *Smith vs. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977); *Complaint of Allied Towing Corp.*, 416 F.Supp. 1207 (E.D. Va. 1976). These courts have sidestepped the literal interpretation of §905(a) in favor of this Court's decision in *Reed vs. The Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1963).

Three circuits and the New York Supreme Court have ruled or indicated in dicta that §905(a) imposes an absolute limitation and forecloses a §905(b) suit in negligence against the owner-employer. *Murphy vs. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976) (dictum); *Arvidson vs. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972); *Houston vs. Bechtel Associates Professional Corp.*, 522 F. Supp. 1094 (D.C.D.C. 1981); *O'Rourke vs. Long*, 41 N.Y.2d 219, 391 N.Y.S.2d 553, 359 N.E.2d 1347 (1976). These courts have taken the approach that §905(a) means exactly what it says, namely, that an employer's liability for compensation shall be exclusive of all other liability.

The two cases which best point up the dichotomous results and reasoning are *Griffith, supra*, and *Baker vs. Pacific Far East Lines, Inc.*, 451 F.Supp. 84 (N.D. Calif. 1978). Most importantly, these cases, the question involved, and the frequency at which the question is likely to arise, present the strongest reasons for review by this Court.

The Third Circuit Court of Appeals in *Griffith* relied on this Court's pre-amendment holding in *Reed, supra*, and on legislative history to reach the conclusion that §905(b) permits a negligence action against an owner-employer. The Court first discussed the language of §905(A) which reads in part:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . ."

There is no exception in §905(a) for §905(b) liability of an "employer" who is also a "vessel," other than, of course, the exception where the employer fails to secure payment

required by the Act. *Griffith I,* 521 F.2d at 42. The Court recognized further that a literal interpretation would be consistent with the language in §933(a), which reads in part:

> "If ... the person entitled to such compensation determines that some person *other than the employer* ... is liable in damage, he need not elect whether to receive such compensation or to recover damages against such third person." (emphasis supplied.)

Finally, the Court conceded that there is "no argument in logic and reason" why longshoremen should be treated any differently under the LHWCA than their land based counterparts under workmen's compensation laws. The Court stated: "The heart of all workmen's compensation systems is the trade-off between the certainty of benefits and the limitation of employer liability." *Griffith I,* 521 F.2d at 42.

However, the Court felt compelled to permit plaintiff's cause of action because of this Court's decision in *Reed* and certain language found in House Reports made in contemplation of the 1972 LHWCA amendments. As this Court well knows, *Reed* construed §905(a) (then §905) as permitting a §905(b) suit based on unseaworthiness against a *pro hac vice* owner who was also an employer. The *Griffith* court reasoned that "since Congress made no change in the operative language of the exclusive remedy provision, [it] would appear to be bound by the eviscerating construction of *Reed vs. The Yaka* ..." *Griffith I,* at 43. The Congressional language relied upon by the Court provide in part:

> "The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services . . ." 3 U.S. Code Cong. & Admin. News, p. 4705 (1972).

And,

> ". . . Nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition . . ." 3 U.S. Code Cong. & Admin. News, p. 4704 (1972).

As indicated earlier, the Ninth Circuit, among others, has taken the exact opposite approach in *Baker vs. Pacific Far East Lines, Inc., supra.* In concluding that §905(a) provides absolute exclusivity, the Court relied on this Court's holding in *Cooper Stevedoring Co. vs. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174, 40 L.Ed.2d 694 (1974), language from the above quoted House Report, and an analogy to state workmen's compensation schemes.

The Court read *Cooper* as limiting the employee's right to recovery to that of unseaworthiness, quoting this Court:

> "[E]ven if Erie were negligent, its injured employee was entitled to claim compensation from it under the Harbor Workers' Act, and Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provision." 417 U.S. at 115, 94 S.Ct. at 2179, 40 L.Ed.2d 694.

It further reasoned that since the Sieracki-Ryan-Yaka decisions only applied in the unseaworthiness context, and since the 1972 amendments eliminated unseaworthiness, the "slate was wiped clean." "Given that Congress worked so hard to preclude the possibility of indirect recovery, it would be anomalous if Congress had simultaneously allowed direct employed versus employer lawsuits." *Baker*, at 94.

The *Baker* court quickly disposed of plaintiff's argument based on the language of the House Report. Noting that the same argument prevailed in the Fifth Circuit, the Court found that the same language can be interpretted to require precisely the opposite result: since negligence actions are not permitted against stevedore-employers, such actions should not lie against vessel-employers either. *Ibid.* at 95.

Finally, the Court held that since negligence actions against employers are not permitted under state compensation statutes, and since Congress' intent has always been to guarantee injured longshoremen treatment similar to that received by land-based workers covered by workmen's compensation, it should follow that LHWCA employers are also immune from negligence suits. The Court cited this Court's decision in *Northeast Marine Terminal Co. vs. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), in support of its rationale.

Thus, these cases represent the two completely different approaches taken and results reached on this very important issue. Because this involves very substantial rights and liabilities, petitioner strongly urges this Court to resolve the matter at this time.

II. The Lower Courts applied Pennsylvania's law of damages and the different treatment among the circuits regarding inflation demonstrates the need for resolution by this Court.

A. The Lower Courts applied Pennsylvania's law of damages.

In 1980, the Pennsylvania Supreme Court announced that inflation must be considered in awarding damages for lost future earnings. *Kaczkowski vs. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). The Court adopted, what is commonly called, the total offset method, whereby the award is not discounted to present value presumably because the inflation rate is equivalent to the discount rate.

It is petitioner's position that the District Court applied Pennsylvania damage law and this was improper since jurisdiction in a LHWCA case is based, of course, on a federal question. And while the Court of Appeals dismissed this point, petitioner refers this Court to Judge Cohill's opinion (App. B, *infra*, 27a) and submits that the conclusion is inescapable that the learned Judge felt bound by *Kaczkowski*. The Petitioner raised this point prior to the start of testimony and filed a Proposed Finding of Fact relating to reduction of any award to present worth. The ruling by the Lower Court is contrary to this Court's holdings in *Pope & Talbot, Inc. vs. Hawn*, 346 U.S. 406, 74 S.Ct. 202, _____ L.Ed. _____ (1953), and *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875). The cases reinforce the mandate of Article III, §2 of the Constitution by requiring a uniform federal standard in "all Cases of admiralty and maritime Jurisdiction."

Petitioner recognizes that admiralty courts may apply state law by express or implied reference when the federal law is incomplete, *St. Hilaire Moue vs. Henderson*, 496 F.2d 973 (8th Cir. 1974), cert. denied, 419 U.S. 884, 95 S.Ct. 151, 42 L.Ed.2d 125 (1974), but submits that this simply is not the case here. Notwithstanding the approach taken by a majority of the circuits sitting in federal question jurisdiction cases, the Third Circuit requires that damages for future impairment or future lost earnings be reduced to present worth. There was no need for the Lower Courts to resort to Pennsylvania's law of damages and the need for upholding the integrity and uniformity of federally created causes of action dictate that this approach be examined and the issue resolved.

B. Different treatment among the circuits regarding inflation demonstrates the need for resolution by this Court.

Assuming *arguendo* that the Lower Courts merely borrowed the underlying theory of *Kaczkowski*, rather than applying the state law *per se*, the proliferation of confusing appellate decisions and the different treatment that the issue of future inflation has received among the circuits demonstrate the need for this Court to rule upon the issue. A survey of the different approaches reinforces the need for a definitive standard.

Presently, six circuits permit future inflation to be taken into account in damage calculations. *Doca vs. Marina Mucante Nicaraguenge, S.A.*, 634 F.2d 30 (2d Cir. 1980); *Bach vs. Penn Central Transportation Co.*, 502 F.2d 1112 (6th Cir. 1974); *O'Shea vs. Riverway Towing Co.*, No. 81-1924, Slip Op. (7th Cir. April 27, 1982); *Riha vs. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975); *United States v. English*, 521 F.2d 63 (9th Cir.

1975); *Steckler vs. United States*, 549 F.2d 1375 (10th Cir. 1977). Three circuits have declined to do so. *Williams vs. United States*, 435 F.2d 804 (1st Cir. 1970); *Magill vs. Westinghouse Electric Corp.*, 464 F.2d 294 (3d Cir. 1972) (until the instant case); *Byrd vs. Reederie*, 638 F.2d 1300, rehearing granted, 650 F.2d 1324 (5th Cir. 1981). And, the Fourth and D.C. Circuits have yet to make an appellate pronouncement on the issue. Generally, the rationale advance by the majority is that discounting, which values a lump sum award to reflect the present purchasing power of the dollar, leaves the plaintiff less fully compensated, given the realities of modern economics. Those Courts rejecting inflation adjustments have done so on the grounds that estimates of future inflation are too speculative to serve as a basis for calculating damages.

While it can be argued that this Court's holding in *Norfolk Western Railway vs. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), at least portends the mood of the Court regarding inflation adjustments in future damage awards, the Second Circuit, in *Doca*, did not suggest that *Liepelt* compelled the result reached there, permitting inflation adjustments. The Fifth Circuit, in *Byrd*, expressly stated that *Liepelt* is not controlling and that it would adhere to its discounting rule until this Court speaks more directly or until that Court *en banc* overturns the rule. Petitioner respectfully submits that "the practical wisdom of the trial bars and the trial bench" will not soon resolve the issue without a definitive statement from this Court on the propriety of inflation adjustments.

There remains the unresolved question of the proper method by which inflation should be considered. The Courts that have permitted inflation adjustment have taken one of four approaches. The first approach submits the question to the factfinder after expert opinion evidence on the rate of future inflation has been introduced. *United States vs. English, supra* at 75-76. The second approach forbids expert testimony and permits the fact-finder to apply his own knowledge and prediction in estimating a future inflation rate. *Bach, supra* at 1122-23. The third method is a blend of the first and second, and allows both common sense and expert opinion evidence. *Riha, supra* at 845. The fourth method removes the issue from the fact-finder and adopts a rule of law that infers a constant relationship between the interest rate and inflation rate. *Kaczkowski, supra* 491 Pa. at 581, 421 A.2d at 1037. There, the Pennsylvania Supreme Court adopted the total offset method. A slightly different approach was adopted in *Feldman vs. Allegheny Airlines, Inc.*, 382 F.Supp. 1291 (D. Conn. 1974), aff'd, 524 F.2d 384 (2d Cir. 1975), where the Court used an inflation adjusted discount of 1.5% after determining that the interest rate averaged 1.5% less than the inflation rate.

The confusion and controversy among circuits is understandable given the variety of approaches outlined above and the general uncertainty surrounding economic forecasting. Petitioner believes that the law is at a stalemate and will develop no further without clarification by this Court.

III. The Lower Courts have imposed on the employer the additional burden of offering to a (totally) disabled claimant whose disability is totally unrelated to his claim, light duty work and have abrogated the plaintiff's duty to mitigate his damages by seeking work which he is capable of performing.

The law is clear that the burden is on the employer to establish that an employee who proves he is disabled from his regular employment has actual opportunities to obtain other work. *Perini Corporation vs. Heyde*, 306 F.Supp. 1321 (R.D.I. 1969). It is equally established, however, that the plaintiff has the duty to minimize his damages by doing work that he can perform. *Powell vs. Hellenic Lines, Ltd.*, 347 F.Supp. 855 (E.D.La. 1972). It follows that the Trial Court's findings concerning the extent and nature of plaintiff's disability are crucial in determining the burdens imposed on the respective parties. Where a finding of total disability is made, the duties imposed by *Perini* and *Powell* are inapposite, and in petitioner's case, it would have no duty to prove that the plaintiff is capable of performing other work. However, in cases of partial disability, the respective duties are imposed. It is petitioner's contention that the findings of fact and law in the District Court fail to provide an adequate basis for determining the duties of the parties. For this reason petitioner presents the issues below in the alternative.

The District Court made inconsistent findings of fact and the Appellate Court failed to face that issue. In Findings numbers 34 and 36 the Court found the plaintiff to be totally disabled, but specifically for reasons not involving the accident complained of. In Findings 41 and 42 the Court then found that plaintiff could perform

sedentary work. Finding 48 was that no light duty job was offered plaintiff by the defendant and incorrectly found in Finding 54 that plaintiff applied for two jobs and was physically unable to pass the physical examinations.

In the Conclusions of Law, the Court completely ignored any conclusion as to the legal obligation of the parties regarding the availability and/or offer of work. By ignoring the Finding of Fact that plaintiff was totally disabled, the finding that the set-off was based upon minimum wage and not light-duty work, the Court effectively ruled that the defendant must offer work to someone who is permanently and totally disabled. It should have been enough to show that the work was available, which was done, rather than require the fiction of an offer to one who could not accept a job.

A. There is no basis in fact or reason for requiring an employer to offer work to an employee, totally disabled from non-work related reasons, in order to receive credit for a set-off.

If the District Court calculated its measure of damages on the basis that respondent was totally disabled, petitioner submits that the employer's showing that light work was available should entitle petitioner to a set-off based on light work wages. It is a meaningless formality to require the employer to offer a position to the employee which the employee is incapable of performing. The District Court seemed to place much emphasis on the fact that petitioner never offered the respondent a light work position, and, apparently on that basis, concluded that the set-off must be calculated using the minimum wage rate. The District Court by so holding, and the Court of Appeals by affirming, tacitly implicated

the *Perini* doctrine. That doctrine limits, by its terms and the facts of that case, the employer's duty of showing that other work is available to situations *where the plaintiff is capable of performing light work.* Petitioner submits that the respondent cannot be said to be totally disabled and, at the same time, capable of performing light work.

B. An employee's failure to pursue in good faith employment which he is capable of performing should not impose upon the employer the burden of providing work to receive a set-off.

If the District Court calculated its damages on the basis that the respondent was capable of performing light duty work, there is an obvious conflict between the employer's duty to show that work is available, *Perini*, and the employee's duty to mitigate his damages, *Powell.* These cases do little to define these duties and it is on this issue that petitioner requests this Court's clarification.

As mentioned earlier, the District Court relied heavily upon the fact that petitioner never offered the respondent a light duty position. Petitioner, at trial, believed that *Perini* required only that it show that light work was *available.* But, even *Perini* contemplates that the plaintiff will seek to mitigate his damages by attempting to perform other work or, at the very least, applying for jobs at which he can work without being affected by his disability. Respondent testified at trial that he casually *inquired* of other work but that he submitted no applications. The District Court stated in its findings of facts that the respondent has *applied* for two jobs and had been refused for failing to pass the physical examinations. Certainly, the Court's finding weighed heavily in its decision.

Respondent's failure to mitigate his damages leaves the petitioner to choose between employing respondent in a different capacity and claiming the set-off based on that wage or not employing the respondent and bearing the entire burden of a set-off based on the minimum wage. This result is anomolous when one considers the results reached in *Baker vs. Baltimore & Ohio R. Co.*, 502 F.2d 638 (6th Cir. 1974); *McGinley vs. United States*, 324 F. Supp. 62 (E.D. Pa. 1971); and *Alexander vs. Meiji Kaiun K.K.*, 195 F.Supp. 831 (E.D. La. 1961), aff'd, 311 F.2d 385 (5th Cir. 1962). Petitioner submits that the amount of an employer's set-off should not be determined as a matter of the employee's choice and respectfully requests this Court to clarify the duties of the employer and employee in situations such as the one presented in the instant case.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Third Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1928

HOWARD E. PFEIFER

v.

JONES & LAUGHLIN STEEL CORPORATION
Owner or owner pro hac vice of
Barges 1011, 1384, 1400, 1363, and
others in a fleet,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA-PITTSBURGH
(D.C. Civil No. 79-1597)

Argued March 18, 1982

Before: ALDISERT, VAN DUSEN, and GARTH,
Circuit Judges

(Filed April 16, 1982)

Robert W. Murdoch, Esquire (Argued)
Jones, Gregg, Creehan & Gerace
1010 Grant Building
Pittsburgh, Pennsylvania 15219
Counsel for Appellant

Jerome M. Libenson, Esquire (Argued)
Baskin and Sears, P.C.
10th Floor, Frick Building
Pittsburgh, Pennsylvania 15219
Counsel for Appellee

Appendix A—Opinion of the Third Circuit Court of Appeals.

ALDISERT, *Circuit Judge.*

Jones & Laughlin Steel Corporation appeals from a judgment in favor of plaintiff Howard E. Pfeifer in a third-party negligence action under the Longshoremen's and Harbor Workers' Compensation Act. The major question presented is whether the district court erred in applying the "total offset method" as a federal rule of damages, wherein the discount factor used to reduce future earnings to present worth is presumed offset by future inflation. We find no error and affirm.

I.

Pfeifer was employed by appellant Jones & Laughlin (J&L) as a landing helper on its coal barges. On January 13, 1978, he slipped and fell because of ice and snow that had accumulated on the gunnel of a barge on which he was working. He struck a barge rail and landed on his tailbone, and a heavy electric motor that he was carrying fell in his lap. He has not returned to work since the accident. He has been examined by a number of physicians, several of whom testified at the trial, and he has undergone extensive physical therapy.

The district court found that appellant was negligent and that its negligence was the proximate cause of Pfeifer's accident and resulting injury. It determined further that Pfeifer was completely disabled from the date of the accident until July 1, 1979, and that thereafter he was capable of doing "light work" and lifting weights of up to twenty-five pounds, but that he could not work on the river. Appellant has not offered Pfeifer a job of any type since his injury, and the parties have not discussed the availability of a light duty position.

Relying on our decisions in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir.

1979), *vacated*, 451 U.S. 965 (1981), *reinstated on remand*, 657 F.2d 25 (3d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3377 (U.S. Oct. 29, 1981) (No. 81-826); and in *Blair v. United States Steel Corp.*, 444 F.2d 1390 (3d Cir. 1971) (per curiam), *cert. denied*, 404 U.S. 1018 (1972), the district court determined that as a vessel owner *pro hac vice*, appellant was liable for negligence under §5(b) of the Longshoremen's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §905(b). In measuring damages, it declined to consider future wage increases or to discount the award to present value, citing *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). The court multiplied Pfeifer's 1978 annual wage by his work life expectancy, deducted the amount of compensation Pfeifer had received under LHWCA, and subtracted his projected earnings at minimum wage from July 1, 1979, until his sixty-fifth birthday, taking judicial notice that the federal minimum wage at the time of the accident was $2.90 per hour.

On appeal, J&L does not challenge the district court's findings that it was negligent and that its negligence was the proximate cause of Pfeifer's injury, nor does it contend that it was not correctly found to be an owner *pro hac vice* under the standards set forth in *Blair*, 444 F.2d at 1391. It argues, however, that because Pfeifer was its employee he does not have a cause of action for negligence under §5(b) of LHWCA. It argues also that the district court erred in applying the Pennsylvania damages test of *Kaczkowski*, and further in factoring damages on the basis of the minimum wage rate instead of wages for light duty.

II.

We quickly dispose of appellant's argument that the district court erred in allowing Pfeifer to proceed in a negligence action against his own employer under §5(b) of LHWCA. J&L reads §5(a) as an absolute limitation on

a longshoreman's right to sue his employer under §5(b): unless the employer has failed to secure payment of compensation as required by §4 of LHWCA, 33 U.S.C. §904, it cannot be held liable as a third party under §5(b). We carefully considered the identical argument in light of the 1972 LHWCA amendments in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31, 38-44 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (*Griffith* I); and we concluded that we remain bound by the Supreme Court's decision in *Reed v. The Yaka*, 373 U.S. 410 (1963), which held that §5(a) (then §5) does not bar a suit against an owner *pro hac vice* who also is an employer liable for compensation. *Griffith* I requires us to reject J&L's argument in this case.

III.

Appellant next argues that the district court erred in its calculation of damages by applying the rule announced in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). It contends that damages in an LHWCA case must be computed according to a uniform federal standard; and that federal law requires that a lump sum award for lost future earnings be reduced to present value, a practice effectively abolished in Pennsylvania by the decision in *Kaczkowski*. To meet this contention, we must explore the developing law of damages in state and federal decisions in light of controlling legal precepts and prevailing economic conditions.

A.

But first we must make the preliminary determination of what precise aspect of the damage issue has been preserved for appeal. Our examination of the record persuades us that appellant has not preserved for review its

contention that the court erred in applying Pennsylvania law because it felt obliged to apply state law, rather than federal law. It was the plaintiff's position at trial that federal law controlled damages and that inflation was a valid consideration under federal law. Appellant did not seem to challenge this position except to suggest that evidence of inflation had to be introduced by expert testimony and that future earnings had to be reduced to present worth:

> MR. MURDOCH: We're here today under a Federal statute under Federal law and I don't think that the finding of the Pennsylvania Supreme Court in the recent case regarding not reducing damages to present worth is applicable in this particular case.
>
> THE COURT: We may have to have a little argument on that at some point.
>
> MR. MURDOCH: Yes, sir.
>
> MR. LIBENSON: Under Federal law, you can add inflation.
>
> MR. MURDOCH: If we have expert testimony.
>
> THE COURT: That's a little bit down the road and we'll wait on that.

App. at 43a.

Standing alone, the court's damages discussion in its opinion, *id.* at 492-93a, may be considered ambiguous; without more, it could be argued that the court was of the view that although this was a federal claim brought in a federal court in Pennsylvania it was required to apply the state law of damages. But when the opinion is read in conjunction with the earlier dialogue between the court and counsel, we are persuaded that the court applied federal law and that the dispute between the parties at trial was limited to the proper federal measure of damages. We conclude that appellant has preserved for review only the question of the proper elements in the federal law of damages under the circum-

stances of this case.[1] It is to this analysis that we now turn.

B.

Our starting point is the recognition that Article III, §2 of the Constitution, in extending the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction,"

> referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

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1. For a reviewing court to determine that there is reversible error, three critical prerequisites must be implicated in the judicial error-correcting process. It is necessary that there be (a) specific acts or omissions by the trial court constituting legal error, (b) properly suggested as error to the trial court, and (c) if uncorrected on that level, then properly presented for review to the appellate court. For there to be *reversible* error, it is mandatory for the appellant properly to identify the error to the trial court and to suggest a legally appropriate course of action. The reasons for this requirement go to the heart of the common law tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways: it gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review. This philosophy is embodied in the Federal Rules of Civil Procedure. Thus, Rule 46 requires a party to "mak[e] known to the court the action which he desires the court to take or his objection to the action *and his grounds therefor*." (Emphasis supplied.)

Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917) (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).[2] We must, therefore, apply a uniform federal rule; and our decision is not controlled, as in diversity cases, by the law of the underlying state.

This recognition is not the end of the analysis, however, but only the beginning. It is not unusual for a federal court to borrow substantive state law and adopt it as federal law. As expressed by Justice Jackson, a federal court addressing a federal question that cannot be answered by reference to federal statutes alone is "free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law." *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 472 (1942) (concurring opinion); *see id.* at 469.[3] No rule of

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2. *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953) (plaintiff's "right of recovery for . . . negligence is rooted in federal maritime law"); 1A Benedict on Admiralty §2 at 1-4 (7th ed. 1981) ("the maritime law must be uniform throughout the nation and state legislation may not introduce disharmonious elements"); H.R. Rep. No. 1441, 92d Cong., 2d Sess. ——, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4705 ("The Committee intends that legal questions which may arise in actions brought under [the 1972 amendments to LHWCA] shall be determined as a matter of Federal law").

3. *See also, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976), which held that the same considerations of public policy that underlie the common law rule of absolute immunity of state prosecutors from tort liability countenance absolute immunity under 42 U.S.C. §1983; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 390-93 (1970), relying on state wrongful death statutes in recognizing a right of action for wrongful death under federal maritime law; *Monroe v. Pape*, 365 U.S. 167, 187 (1961), holding that 42 U.S.C. §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions;" *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), which held that in fashioning substantive federal law under §301 of the Labor Management Relations Act, 29 U.S.C. §185, "state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy;" and *United*

state law applies of its own force to compel a particular decision; but we may resort to a rule derived from any source, state, federal, or foreign, if its intrinsic wisdom commends it to the case at hand. Once we have transplanted to federal soil a rule previously adopted by a state court, however, it takes on a new life of its own and grows independently of further modifications or refinements announced by the court which first gave it root. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *D'Oench, Duhme*, 315 U.S. at 469 (Jackson, J., concurring).

Accordingly, we find no jurisprudential impediment to adoption of the state measure of damages. We now turn to prudential and consequential considerations, and we must respect the important concerns of consistency and coherence in the law of damages.

C.

Prior to 1980, the Pennsylvania law of damages for torts did not take into account the pernicious presence of inflation. Thus in 1976 the Pennsylvania Superior Court was of the view that "the erratic behavior of the economy over the past half dozen years, plagued by war and other unusual circumstances, is not a sufficient demonstration that inflation at any predictable rate will continue for another twenty years." It thus dismissed consideration of inflation as "speculative." *Havens v. Tonner*, 243 Pa.Super. 371, 378, 365 A.2d 1271, 1274 (1976). In 1980, however, Pennsylvania's highest court concluded.

NOTE — *(Continued)*
States v. Hext, 444 F.2d 804, 809-11 (5th Cir. 1971), looking to Article 9 of the Uniform Commercial Code as a source of federal common law governing suits arising from Farmers' Home Administration secured loan transactions, under the doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

"in light of clear scientific evidence of the fact that inflation . . . [has] become an established part of our economy," that this factor must be considered in awarding damages for lost future earnings. *Kaczkowski*, 491 Pa. at 566-67, 421 A.2d at 1030.[4] It held that continued judicial refusal to recognize the impact of inflation, while maintaining the practice of discounting lump sum awards to "alleged present value," *id.* at 570, 421 A.2d at 1032, would "ignore our responsibility to attempt to 'graduate the amount of the damage award exactly to the extent of the loss.' " *Id.* at 571, 421 A.2d at 1032 (quoting *Forsyth v. Palmer*, 14 Pa. 96, 97 (1850)).

In a most persuasive opinion, replete with relevant and credible economic data, *see, e.g., id.* at 572-74 nn. 11-15, 580-81, 421 A.2d at 1033 nn. 11-15, 1037, the court declared:

> Despite the uninformed belief of the [*Havens*] court, inflation and productivity factors are not speculative and are capable of definition and prediction by economic experts. For decades, economists

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4. Writing for the court, Justice Nix defined inflation as follows:

> Inflation is "the increase in the volume of money and credit relative to available goods resulting in a substantial and continuing rise in the general price level." Websters, Third International Dictionary (1965). Inflation gains are measured in terms of what the average person refers to as "cost of living increases." An example of inflation evidencing an increase in prices unrelated to an increase in intrinsic value is that the juice content of oranges has not increased in years, but their price continues to rise.
>
> The presence of inflation plays two distinct roles in an award for prospective damages. The first role is determining the impact of inflation on the future earnings of the victim. The second place in which inflation plays a part is in determining the appropriate interest rate to discount the future damage award to its present value.

491 Pa. at 565 n.4, 421 A.2d at 1029 n.4.

> have been refining tools to forecast economic growth and have used these tools with proven accuracy. Sophisticated economic forecasts are relied upon by every major government agency, corporation, and financial institution. These forecasts are based upon all that is known in the American economy and despite small tolerances of error, these projections have been accurate in the past. *See, District of Columbia v. Barriteau*, D.C.App., 399 A.2d 563, 566 (1979). Thus, there exists a reasonable basis in fact for this court to consider the impact of inflation and productivity on lost future earnings. A court has a responsibility to the citizenry to keep abreast of changes in our society. In light of the recognized acceptance of the science of economics, the courts of this Commonwealth can no longer maintain their ostrich-like stance and deny the admissibility and relevancy of reliable economic data concerning the impact of productivity and inflation on lost future earnings. Indeed, to ignore economic realities and presume that there will be no changes in an individual's future earnings because of such factors is further removed from reality than any variance that may result from our efforts to predict these factors.

Id. at 572, 421 A.2d at 1032-33.

But the 1980 Pennsylvania decision was not without formidable precedent. In the post World War I inflationary period, over a half century ago, the Vermont Supreme Court cited extensive authority for considering inflation in awarding damages:

> The result sought by the law in assessing damages in [tort] cases is compensation — so far as a money payment can — the ascertainment of such a sum as will compensate the plaintiff for the injury. Necessarily, damages are to be expressed in terms of money. . . . As a medium of exchange, its value

> appreciates or depreciates according to the rise and fall in commodity prices. So it is that, at least so far as those elements of damages properly classed as pecuniary losses — like loss of time, loss of earning power, expenses and the like — are concerned, it is proper for the jury to take into consideration the fact, known to everybody, that the purchasing power of money is at present seriously impaired.

Halloran v. New England Telephone & Telegraph Co., 95 Vt. 273, ——, 115 A. 143, 144 (1921).[5]

Moreover, state judges have not been alone in recognizing, in Justice Roberts' words, that "the orderly development of the law must be responsive to new conditions and to the persuasion of superior reasoning." *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 23, 203 A.2d 796, 806 (1964). Over 20 years ago, in a case under the Federal Employers' Liability Act, Judge Friendly wrote that "there is little or no authority in favor of charging the jury to take future inflation into account," but he recognized that "there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity." *McWeeney v. New York, N.H. & H. R.R. Co.*, 282 F.2d 34, 38 (2d Cir.) (in banc), *cert. denied*, 364 U.S. 870 (1960). Eleven years later, in a longshoreman's personal injury case, Judge Friendly noted that "if inflation should continue at its present pace, courts may have to reconsider the propriety of the long recognized charge with respect to discount." *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 79 (2d Cir. 1971) (citing McWeeney).[6] More recently, in

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5. A comprehensive list of state cases is set forth in *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271, 1290 (D.Conn. 1974), *aff'd in pertinent part*, 524 F.2d 384 (2d Cir. 1975). *See also* Annot., 12 A.L.R.2d 611.

6. The court in *Yodice* declined to undertake the suggested reconsideration because "the complete absence of economic data in

Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 36 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981), a second circuit panel in an LHWCA case surveyed the economic literature demonstrating the persistence of strong inflationary pressures and held that "inflation should be considered in estimating the present value of lost future wages." *See also, e.g., Steckler v. United States*, 549 F.2d 1372, 1375-78 (10th Cir. 1977) (Federal Tort Claims Act); *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 308-11 (5th Cir. 1976) (Wisdom, J., specially concurring) (admiralty); and *United States v. English*, 521 F.2d 63, 72-76 (9th Cir. 1975) (Tort Claims Act). And the virulent influence of inflation was strikingly brought home to federal judges in *The Report of the Commission on Executive, Legislative, and Judicial Salaries* (December, 1980) at 7-9. The report disclosed the following:

- From 1969 to 1980, the Consumer price index rose by more than 130 per cent.
- During the same period, the Hourly Earnings Index, which reflects wage rates in the private, non-farm economy, also rose by more than 130 per cent.
- The 1980 $57,500 salary for U.S. Circuit Judges amounted to $24,400 in terms of 1969 dollars or a reduction of 43 per cent.

NOTE — *(Continued)*

the present record and the relatively small loss of future earnings" made it "difficult to imagine a case which would be a more inappropriate vehicle for that purpose." 443 F.2d at 79. Given the extensive subsequent development in the common law, the present economic certainty of continuing inflation, and the careful presentation of the issue in an adversarial context in this case, we are not now limited by the factors that properly counselled restraint in *Yodice*; and we believe that the time has arrived for the reconsideration invited in that decision.

Notwithstanding the reticence of the courts in an earlier era, it cannot be argued effectively today that inflation has been only a temporary phenomenon on the American scene. If this reality of modern economic life can be considered in calculating damages without resorting to speculation, it should be conceded that when relevant, consideration of inflation qualifies under the criteria of "justice," "common sense," and "public policy" generally used by the courts in evaluating the consequences of embracing a new and attractive rule of law — what legal philosophers are wont to describe as "utilitarian" in the Benthamite scale of supposedly measurable aggregates of pleasures and pains.[7] If the spectre of "speculation" is removed, a matter we shall address later, our immediate task is to determine whether the *Kaczkowski* formula is congruent with the federal law of damages in maritime cases. We believe it is.

D.

The relevant federal law of damages is familiar and uncomplicated, and is not materially different from comparable state law. This court carefully surveyed the case law and delineated the permissible elements of recovery in *Downie v. United States Lines Co.*, 359 F.2d 344, 347-48 (3d Cir.) (in banc), *cert. denied*, 385 U.S. 897 (1966). We adhered in that decision to the general rule that a seaman injured by the tortious conduct of his employer is entitled to an award of damages commensurate with the nature and extent of his injuries. He is entitled to reimbursement for his loss of earnings, past and prospective; for any impairment of his earning capacity; for medical expenses incurred and to be incurred; and for any other economic loss he may have sustained or is likely to sustain. He is also entitled to redress for his

7. *See* N. MacCormick, Legal Reasoning and Legal Theory 105 (1978).

physical injury, including the effects thereof, such as pain, suffering, mental anguish, discomfort, and inconvenience. If the injuries are permanent and result in an impairment of earning capacity, he may recover damages for such impairment, including (but not limited to) his probable loss of future earnings. Damages resulting from the impairment of earning capacity and the probable loss of earnings must be measured on the basis of life expectancy at the time of injury. The award must be based upon the probable pecuniary loss reduced to its present net worth. The injured worker is also entitled to compensation, again based on life expectancy at the time of the injury, for the physical and mental effects of the injury on his ability to engage in those activities which normally contribute to the enjoyment of life, including, for example, his avocations. The specific elements of such an award necessarily depend upon the proofs. There are no precise criteria by which these elements may be evaluated, but they are measurable to the same extent as pain, suffering, and mental anguish.

Full compensation for lost prospective earnings is most difficult, if not impossible, to attain if the court is blind to the realities of the consumer price index and the recent historical decline of purchasing power. Thus if we recognize, as we must, that the injured worker is entitled to reimbursement for his loss of future earnings, an honest and accurate calculation must consider the stark reality of inflationary conditions.

IV.

What had troubled the courts for years was the speculative nature of predicting future inflationary trends. The Pennsylvania Court has not only recognized this problem but met it head on by adopting what is known as the "total offset method," a variation of methods introduced by the federal district court in *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D.Conn.

1974), *aff'd in pertinent part*, 524 F.2d 384 (2d Cir. 1975), and the Alaska Supreme Court in *Beaulieu v. Elliott*, 434 P.2d 665 (1967), and *State v. Guinn*, 555 P.2d 530 (1976). The total offset method avoids the danger of speculating as to the future rate of inflation by making what we consider a very sensible accommodation: it assumes that in the long run the effects of future inflation and the discount rate will co-vary significantly with the other. *See* authorities cited in *Kaczkowski*, 491 Pa. at 581, 421 A.2d at 1037. Moreover, we are impressed by the pragmatic considerations embraced by the Pennsylvania court:

> An additional virtue of the total offset method is its contribution to judicial efficiency. Litigators are freed from introducing and verifying complex economic data. Judge and juries are not burdened with complicated, time consuming economic testimony. Finally, by eliminating the variables of inflation and future interest rates from the damage calculation, the ultimate award is more predictable.

Id. at 583, 421 A.2d at 1038.

We are impressed by the "total offset method" because it both accommodates the reality of inflation and bids fealty to the concept of reducing future earnings to present worth. It makes a judgment — evaluative to be sure, but no better or no worse than the varying prognostications of expert witnesses — that the rate of future inflation will be equivalent to future interest rates. From a pragmatic viewpoint, lost future earnings need not be discounted to present value, although the formula calls for a theoretical reduction to present worth, because the inflation and discount rates are legally presumed to be equal and cancel one another.

We find the foregoing analysis coherent and consistent with the elements of damages discussed in previous case law. It does not contradict valid and binding rules of our court. The total offset formula embodies the

continued requirement of reduction to present worth, *see Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485 (1916); *Downie*, 359 F.2d at 347, and it avoids considerations that would tend to introduce an illicit speculative element into the computations. Indeed, by eliminating the discount factor from the jury's or the court's calculations, the total offset method will tend to eliminate the necessity for speculation, to introduce greater certainty into the parties' own calculations, and thereby perhaps to facilitate settlement of personal injury claims without the necessity of judicial intervention. We therefore hold that the district court did not err in computing damages for the loss of future earnings, because it is not necessary to go through the process of discounting lump sum awards to theoretical present value; the discount factor is presumed equal to and offset by the impact of inflation on the future economic value of the award.

V.

Appellant's final contention is a challenge to the factual predicate of the court's computation of projected earnings. It argues that the court erred in using the minimum wage as a factor instead of the wage J&L pays its light duty employees. At bottom this is a question of fact finding reviewed under the "clearly erroneous" standard. Fed. R. Civ. P. 52(a); *see Krasnov v. Dinan*, 465 F.2d 1298, 1302-03 (3d Cir. 1972). We do not view the findings as clearly erroneous.

VI.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix A—Opinion of the Third Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 81-1928

HOWARD E. PFEIFER,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
Owner or owner *pro hac vac vice* of Barges
1011, 1384, 1400, 1363, and others in a fleet,
Appellant.

(D. C. Civil No. 79-1597)

On Appeal from the United States District Court
for the Western District of Pennsylvania.

Present: Aldisert, Van Dusen and Garth,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 18, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 16, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:
SALLY MRVOS
Clerk.

April 16, 1982.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1928

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v.

JONES & LAUGHLIN STEEL CORPORATION
Owner or owner pro hac vice of
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others in a fleet,

Appellant

(W.D. Pa. (Pgh.) Civil No. 79-1597)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER, BECKER and VAN DUSEN,
Circuit Judges

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams and Hunter would grant the petition for rehearing.

Appendix A—Opinion of the Third Circuit Court of Appeals.

Statement of Judge Adams:

Judge Adams believes that the damages rule established in this case — that inflation and interest rates will be deemed to offset one another so that no discount to present value is necessary — is likely to have considerable consequences for a great many subsequent cases. Although it may be that economic conditions warrant this dramatic change in our system of calculating damages, the presence at this time of very high interest rates and substantially reduced inflation would suggest caution in adopting a rule that appears to be premised on some immutable relationship between interest and inflation. Even if the newly-adopted damages rule is appropriate under today's economic situation, institution of the rule is a matter of unusual importance that merits consideration by the full Court. Moreover, because the rule implicates interests and affects parties in a wide range of litigation settings, rehearing in banc would provide an opportunity for this Court to consider amicus briefs from other groups concerned with the damages rule. Accordingly, he dissents from the denial of rehearing in banc.

Judge Hunter also would grant rehearing and joins in Judge Adams' statement.

BY THE COURT,

RUGGERO J. ALDISERT

Circuit Judge

Dated: May 20, 1982

Appendix A—Opinion of the Third Circuit Court of Appeals.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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UNITED STATES COURT OF APPEALS
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JONES & LAUGHLIN STEEL CORPORATION
Owner or owner pro hac vice of
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Appellant

(W.D.Pa. (Pgh.) Civil No. 79-1597)

AMENDMENT
SUR PETITION FOR REHEARING

Judge Adams' statement granting petition for rehearing in the above, filed on May 20, 1982, is to be amended to include a footnote following the second sentence in that statement, to read as follows:

1. Other Courts of Appeals have considered the problem of accounting for inflation in damage awards, and have arrived at outcomes that are somewhat at variance with the rule adopted here. The Second Circuit, for example, after reviewing economic literature in the field, ruled that damage awards should still be discounted to reflect a "real" interest rate, untainted by inflation, estimated at about one to two percent. *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39-40 (2d Cir. 1980); *accord, O'Shea v. Riverway Towing Co.*, No. 81-1924, Slip Op. at 9-12 (7th Cir. Apr. 27, 1982). The Fifth Circuit, which has until now applied a higher discount rate, recently voted to reconsider in banc the

proper treatment of inflation in calculating damage awards. *Byrd v. Reederei*, 638 F.2d 1300, *rehearing granted*, 650 F.2d 1324 (5th Cir. 1981).

BY THE COURT,

ARLIN M. ADAMS

Circuit Judge

Dated: June 1, 1982

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix A—Opinion of the Third Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 81-1928

HOWARD E. PFEIFER,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
Owner or owner *pro hac vac vice* of Barges
1011, 1384, 1400, 1363, and others in a fleet,
Appellant.

(D. C. Civil No. 79-1597)

On Appeal from the United States District Court
for the Western District of Pennsylvania.

Present: Aldisert, Van Dusen and Garth,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 18, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court, entered April 16, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:
SALLY MRVOS
Clerk.

April 16, 1982.

Certified as a true copy and issued in lieu of a formal mandate on May 28, 1982.

Costs taxed in favor of appellee as follows:

Brief	$184.75
TOTAL	$184.75

Test:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit.

Appendix A—Opinion of the Third Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Third Circuit

June 8, 1982

No. 81-1928

HOWARD E. PFEIFER,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
Owner or owner *pro hac vac vice* of Barges
1011, 1384, 1400, 1363, and others in a fleet,
Appellant.

(D. C. Civil No. 79-1597)

Present: Aldisert.

1. Motion by appellant for stay of mandate which the Court may wish to treat as a motion to recall the mandate;

2. Answer by plaintiff-appellee to motion for stay of mandate;

3. The opinion was filed and judgment entered on April 16, 1982. An order denying appellant's petition for rehearing *en banc* was filed May 20, 1982.

Appendix A—Opinion of the Third Circuit Court of Appeals.

The certified judgment in lieu of formal mandate issued on May 28, 1982;

in the above-entitled case.

Respectfully,

SALLY MRVOS/(Illegible)
Clerk

mmd
Enc.

The foregoing Motion is/are granted and the mandate is recalled. Appellant is directed to notify the Clerk when the Petition for Certiorari is filed or alternatively, if it is decided that no such Petition will be filed.

BY THE COURT,

ALDISERT,
Judge.

Dated: June 11, 1982.

APPENDIX B.

Opinion of the District Court for Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

Civil Action No. 79-1597.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Howard E. Pfeifer, brought this action pursuant to the Longshoremen's & Harbor Worker's Compensation Act, §5(b), *as amended*, 33 U.S.C. §905(b), to recover damages from defendant, Jones & Laughlin Steel Corporation, for personal injuries allegedly sustained as the result of defendant's negligence. Pursuant to Fed. R. Civ. P. 52, we make the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff is an individual residing at Box 126-A, R.D. #1, Ford City, Armstrong County, Pennsylvania 16226.

2. Defendant is a corporation with its principal place of business in Pittsburgh, Allegheny County, Pennsylvania.

3. Defendant corporation is engaged, *inter alia*, in the business of owning and operating a fleet of vessels, boats and barges upon the Ohio, Monongahela and Allegheny Rivers and their tributaries, all of which are navigable waters of the United States.

4. At the time of plaintiff's accident, the defendant had a fleet of approximately thirty-five coal barges at its No. 1 landing on the north side of the Monongahela River and used said vessels in the aforementioned navigable waters of the United States. At all times hereinafter mentioned, defendant owned, managed and operated, or was owner *pro hac vice*, of said vessels.

5. Plaintiff was permanently employed by defendant for nineteen years as a landing helper on defendant's coal barges. The defendant moved barges to and from its by-products plant on the Monongahela River, and plaintiff aided in loading and unloading the barges at that plant.

6. On January 13, 1978, plaintiff reported to work at landing No. 1 at 12:00 A.M. Defendant assigned plaintiff the duties of a "head man." (Although ordinarily classified as a landing helper, plaintiff worked as head man when the regular head man was absent because of illness or vacation).

7. Plaintiff's duties on January 13, 1978 consisted of moving loaded barges of coal to the coal hoist or elevator to be emptied into defendant's coal bins, moving the

empty barges away from the coal hoist, and tying them with other barges to be joined in a fleet and moved away. Plaintiff's duties also included filing reports, inspecting the loaded barges in the fleet for possible leaks, and, when necessary, pumping water out of the leaking barges.

8. Two other bargemen or bargehelpers, Walter Tadder and Harvey Hicks, assisted plaintiff in his duties on January 13, 1978.

9. Plaintiff's accident occurred during the 12:00 A.M. to 8:00 A.M. shift on that date.

10. There was an accumulation of snow and ice on the gunnels of the barges where plaintiff was working. A weather report (Plaintiff's Exhibit "2") indicates that the temperature was 22 degrees, that there had been a two-inch accumulation of snow on January 12, 1978, and that an additional inch of snow fell between 12:50 A.M. and 6:50 A.M. (hours included in plaintiff's shift) on January 13, 1978.

11. It was customary at the No. 1 landing to have salt stored for use in salting the gunnels of the barges and dissolving ice on the loads of coal. The salt was usually available in five-gallon paint buckets. It also was customary for additional personnel to be used when there were snowy and icy conditions. This procedure was sometimes referred to as "doubling out."

12. At approximately 12:30 A.M., plaintiff requested salt from the shift foreman, Sherman Haddex. Haddex responded that he had no one available to deliver the salt.

13. In addition to requesting salt, plaintiff asked the shift foreman for additional help in shovelling snow off of the gunnels.

14. No snow was shoveled from the barges during plaintiff's shift because the men working that shift were busy moving barges and attending to a sinking barge. (Some barges had broken loose earlier that night, requiring an additional motor vessel to come up and bring them back into the fleet. This reduced the time available to attend to the sinking barge earlier or to shovel snow and ice. In addition, the third man on the shift that night, Harvey Hicks, was quite inexperienced and therefore provided less help than an experienced man might have in moving the barges and taking care of the fleet. In fact Tadder had to stay close to Hicks most of the time because the weather conditions, together with Hicks' inexperience, caused Tadder to be concerned about Hicks' safety.)

15. OSHA regulations (Plaintiff's Exhibit "11," pages 102, 103) required defendant to remove the snow from the gunnels of barges and not allow a slippery surface. Defendant failed to comply with these governmental safety regulations and the safety and health regulations for longshoremen.

16. At the start of plaintiff's shift, one of the barges in the fleet was leaking, and one pump in a gunnel at the quarter head of the barge was in operation. The leaking barge had a full load of coal.

17. At about 4:00 A.M., plaintiff learned that the leaking barge was starting to sink, and upon inspection

the men on the 12:00-8:00 A.M. shift decided that the barge needed an additional pump in its bulkhead.

18. The pumps available on the night of plaintiff's accident were more cumbersome and not as easy to connect to the electrical system as the pumps which were usually supplied.

19. The pump that plaintiff used that night consists of three parts: a leg or tube of metal approximately eight feet long with a propellor at the bottom, weighing between 80 and 90 pounds; a 12-inch by 18-inch electric motor weighing approximately 80 pounds; and an electrical connection. The operation of this pump requires the insertion of an electrical line that was rolled from a heavy spool. Ordinarily three men are needed to assemble the pump.

20. Walter Tadder went to get the leg of the pump; Harvey Hicks went to get the electrical wiring, and plaintiff went to the pump barge and found a motor and breaker box. Plaintiff proceeded to walk from the pump house across the gunnel of a barge carrying the motor on his right shoulder and the breaker box, which weighs approximately 5 pounds, in his left hand. He had traversed three quarters of the barge gunnel and had reached the quarter head in view of Tadder, who was on the sinking barge, when both of his feet went out from under him because of the ice and snow accumulated on the gunnel of the barge.

21. Plaintiff could not break his fall because he was carrying the motor and breaker box. Plaintiff struck a barge rail and landed on his tailbone, with the motor falling onto his lap.

22. Plaintiff complained that his neck and the right side of his back were sore. (Plaintiff's medical case record (Plaintiff's Exhibit "4") states that plaintiff suffered mild soreness to the nape of his neck, and a mo erate severe contusion to the coccygeal region with swelling and that he complained of soreness in his thoracic lumbar region.)

23. Walter Tadder, who saw plaintiff fall, took the motor off of plaintiff's lap, and together with Hicks, inserted the motor into the pipe while plaintiff held a flashlight.

24. The sinking barge was only 2½ to 3 inches above the water when plaintiff was carrying the pump motor, and it therefore presented an emergency situation.

25. The testimony of defendant's witnesses regarding the use of salt on gunnels was contradictory. David Curran testified that the men do not salt the gunnels, whereas Sherman Haddex, the foreman, testified that they do.

26. Haddex stated in his accident report that "not putting salt on icy barges" was an unsafe practice. (Plaintiff's Exhibit "3," Line 18).

27. The report went on to note that in order to prevent similar accidents, the river crew was to be instructed to salt the gunnels of the barges. (Plaintiff's Exhibit "3," Line 26).

28. Defendant, through Mr. Haddex, admits that "ice on gunnels of barges" is an unsafe condition (Plaintiff's Exhibit "3," Line 19).

29. The day of the accident, plaintiff went to defendant's dispensary to get medication and to have X-rays taken. Plaintiff was taken from the dispensary to South Side Medical Center where more X-rays were taken.

30. Plaintiff's back was black and blue and swollen below the belt line immediately after his fall.

31. In April, 1978, defendant's plant physician, Dr. Anas El Attar, prescribed physical therapy for plaintiff. On January 20, 1978, Dr. El Attar had certified that plaintiff could return to work without restrictions immediately, but plaintiff did not. Between April, 1978 and April, 1979, plaintiff went to Citizens General Hospital in New Kensington for physical therapy fifty-eight times.

32. At defendant's request, plaintiff was seen in consultation with neurosurgeons, Hershey, Gray & Palmer, and by Dr. Danilo L. Enriquez. None of these doctors required plaintiff to undergo any additional treatment or medical procedures. None of the consultant physicians recommended that plaintiff return to work.

33. Dr. Enriquez performed electromyographic studies, the results of which were consistent with a motor neuron disease.

34. Dr. El Attar issued a certificate stating that as of March 16, 1979, the plaintiff was totally disabled as a result of (a) advanced degenerative osteoarthritis of the spine, cervical, thoracic and lumbar, (b) partial blindness, and (c) generalized muscular dystrophy.

35. In his testimony, Dr. El Attar stated that the term "muscular dystrophy" was not used in its popular sense, but rather, was used to describe a muscular weakness in order to help plaintiff qualify for the medical disability pension that he had requested.

36. Dr. El Attar testified that there was no disability whatsoever as of March 16, 1979 as a result of the alleged injuries of January 13, 1978, but plaintiff could not be reemployed by Jones and Laughlin as a result of Dr. El Attar's findings of March 16, 1979.

37. Joseph Novak, M.D., a Board certified physician, examined plaintiff on May 22, 1979 at the request of the Hartford Insurance Company; he subsequently testified on behalf of plaintiff. Plaintiff had no independent medical treatment or examination of his own choosing.

38. Plaintiff could not do a sit up, had limited range of motion in his back, and no muscle tone. He had soreness and pain that felt like he was "sitting on golf balls," neck pain, continuous headaches (occipital and frontal), low back pain and pain in both hips. He had to go to bed early at night because of increasing pain; he had been taking pain medicine.

39. Dr. Novak's examination revealed that plaintiff is skinny, muscular, walks stooped forward, has a flattening of his lumbar lordosis, and has some limitation of motion of his lumbar spine, but that plaintiff willingly went through the requested maneuvers. Plaintiff was able to walk on his tiptoes and heels without any difficulty and had no sciatic stretch pain on straight leg raising; his reflexes were 3 plus and active in both legs; there

were no atrophies visible and his muscles were normal. Plaintiff told Dr. Novak that he was unable to do a sit up because of low back pain.

40. It was Dr. Novak's opinion, within a reasonable degree of medical certainty, that the fall of January 13, 1978 was a superimposed trauma on the pre-existing condition of degenerated arthritis to the lumbar and cervical spine.

41. It was also Dr. Novak's opinion, within a reasonable degree of medical certainty, that plaintiff was permanently disabled and unable to do the work that he formerly had performed.

42. Dr. Novak stated that it was his opinion that plaintiff was limited to a very restricted, sedentary, light type of work and that he knew of no light duty that could be performed in defendant's place of business.

43. Dr. Novak testified that he had reviewed the report of Dr. El Attar and Dr. Enriquez and found no indication of a muscular dystrophy as reported by Dr. El Attar. He criticized diagnosis and further stated that he was eminently qualified to disagree with Dr. El Attar on the diagnosis. Dr. Novak further testified that he did not feel that Dr. Enriquez's diagnosis was correct and speculated that he was practicing defensive medicine in regard to his diagnosis of motor neuron disease, which he depicted as "The Lou Gehrig Disease." Dr. Novak stated that in his opinion plaintiff did not have a motor neuron disease and that plaintiff would not be here today if he had it.

44. Dr. Novak testified that in his opinion, osteoarthritis can be present in a person for twenty years without the person knowing of this condition. It was his opinion, within a reasonable degree of medical certainty, that the trauma, that is, plaintiff's fall on January 13, 1978, superimposed on his existing arthritis, caused plaintiff's present permanent disability and his inability to perform his former occupation.

45. When plaintiff underwent physical therapy treatments at Citizens General Hospital, New Kensington, Pa. (see finding No. 31), it was under the supervision of Dr. El Attar. He was also seen by other physicians and given medication.

46. Dr. El Attar testified that by March of 1979, plaintiff could have been active and could have lifted fifty pounds. Dr. Novak felt that plaintiff was capable of carrying ten to twenty-five pounds and could have held a job that might involve sitting, standing, walking or driving for periods of up to two hours, but at the end of such a two-hour period he would have to rest.

47. We find that after July 1, 1979, plaintiff would have been capable of doing light work which could involve lifting weight of not more than twenty-five pounds.

48. Defendant never offered plaintiff a job of any type after his injury. There were never any discussions between defendant and plaintiff regarding the availability of a light duty job.

49. The plaintiff could not work on the river.

50. Plaintiff's annual wage in 1978 was $26,065.

51. As of October 31, 1980 (the date of trial), plaintiff had received payments of $33,079.14 under the Longshoremen's and Harbor Workers' Compensation Act.

52. The legal minimum hourly wage in the United States in 1979 was $2.90, or $6,032 per year ($2.90 x 2080 hours).

53. Plaintiff has a seventh grade education and has no job experience other than heavy, outdoor, strenuous, laboring-type work. He had worked steadily for the defendant for nineteen years and was considered a good worker.

54. Plaintiff applied for two jobs after the accident but was unable to pass the physical examinations required.

55. Plaintiff was born on June 27, 1925, was approximately 52-1/2 years old when the accident occurred on June 13, 1978 and will be 65 years old on June 27, 1990, twelve and one-half years after the accident.

56. Plaintiff's work expectancy at the time of the accident was twelve and one-half years.

Conclusions of Law

1. This Court has jurisdiction pursuant to 28 U.S.C. §1333.

2. In 1972, Congress amended the Longshoremen's and Harbor Worker's Compensation Act of 1927 (hereinafter "LHWCA"), 33 U.S.C. §§901-950, fundamentally changing the basis for a longshoreman's action

against a vessel owner. Under the Act as amended, a vessel owner is no longer strictly liable for a longshoreman's injuries on the basis of unseaworthiness or nondelegable duty, or for a stevedore's negligence under a *respondent superior* theory. Imstead, "an owner [is] liable to an injured longshoreman only for its own negligence that proximately caused the injury." *McCarthy v. Silver,* 487 F. Supp. 1021, 1024 (E.D. Pa. 1980). *See Rich v. United States Lines, Inc.,* 546 F.2d 541, 545 (3d Cir. 1979).

3. The Third Circuit has held that "[Section] 905(b) imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case' that would be applicable to a land based business." *Griffith v. Wheeling-Pittsburgh Steel Corp.,* 610 F.2d 116, 125 (3d Cir. 1979), *appeal pending,* 444 U.S. 1042 (1980).

4. Applying this standard, the *Griffith* court stated that a vessel could be found negligent on a showing: (1) that the vessel knew of or by exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would impose an unreasonable risk of harm to a longshoreman working on board the ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoreman against that danger. *Id.* at 126.

5. In *Griffith,* a barge was delivered to a steel company's landing by a riverboat company and was incorporated into a fleet there under the supervision of the steel company's dock foreman. The barge was in the ex-

clusive possession of the steel company until the time of the accident; its movement was the responsibility of the foreman, and the steel company was free to choose which barge it would use for steel products. The Third Circuit found that these facts fit squarely within *Blair v. United States Steel Corp.*, 444 F.2d 1390 (3d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972), in which the Court held that a bailee in exclusive possession of a river barge is the owner *pro hac vice* of the vessel.

6. We find that the defendant, Jones & Laughlin Steel Corporation, was the owner *pro hac vice* of the barges in the fleet at its No. 1 landing on January 13, 1978.

7. Applying the standard of care set forth in *Griffith* to the facts of this case, we find that defendant, as owner *pro hac vice* of the barge on which plaintiff was injured, was negligent.

8. The weather report shows that there was an accumulation of snow and ice on the gunnels at the time of plaintiff's accident. Prior to the accident, defendant had requested salt, as well as additional workmen to shovel the snow.

9. Thus, the defendant knew of the condition on board the vessel that led to plaintiff's injury, knew that the condition imposed an unreasonable risk of harm to longshoremen working on the vessel, and failed to exercise reasonable care to protect the longshoremen against danger.

10. The evidence presented demonstrated that plaintiff slipped and fell on the snow and ice that defendant had allowed to accumulate on the gunnels of the barge, *i.e.*, defendant's failure to provide salt, or to salt the gunnels, and its failure to provide additional help to shovel snow and clear ice off the gunnels were the proximate causes of plaintiff's injury.

11. A longshoreman may recover damages for injuries he sustained if he demonstrates that the owner was negligent in failing to correct a dangerous condition of the vessel not created by the employee, and that the owner's negligence was the proximate cause of his injury. In this case, the dangerous condition caused by the snow and ice was created prior to and during plaintiff's shift and defendant had notice of the condition as a result of plaintiff's request for salt and additional help in shovelling the gunnels of the barges prior to his accident.

12. There was no contributory or comparative negligence on the part of plaintiff.

Damages

1. On the basis of our Findings of Fact, we must award damages to plaintiff based on the following: 1) his complete inability to work from January 13, 1978, the date of the accident, until July 1, 1979, after which time we have found that plaintiff was capable of doing light work; 2) his reduced capacity for work from July 1, 1979 until his presumed date of retirement on his 65th birthday, June 27, 1990; and 3) pain, suffering, and inconvenience sustained.

2. Counsel for plaintiff has submitted, as proposed damages, a computation of plaintiff's estimated wages as an employee of the defendant from the date of the accident until his presumed date of retirement. He has included in this proposal cost of living raises predicated on the recent history of defendant's wage rates. We do not disagree with these projections, but feel they are inappropriate in view of the holding in *Kaczkowski v. Bolubasz*, _____ Pa. _____, 421 A.2d 1027 (1980).

This case sets forth a new procedure for covering damages in personal injury cases. The Supreme Court of Pennsylvania stated that

> Henceforth, in this Commonwealth, damages will be awarded for lost future earnings that compensate the victim to the full extent of the injury sustained. Upon proper foundation, the court shall consider the victim's lost future productivity. Moreover, we find as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting. Thus, the courts of this Commonwealth are instructed to abandon the practice of discounting lost future earnings.

Id. at _____. 421 A.2d at 1038-39.

3. We believe that it would be inconsistent with the *Kaczkowski* decision to build into a damage award projected cost of living increases, since this would give plaintiff a double consideration for inflation; it would permit plaintiff to have the advantage of the *Kaczkowski* case in which inflation is presumed to offset future interest rates while at the same time allowing him to insert cost of living increases into the award.

4. We have found that the plaintiff could have taken up light work on July 1, 1979. We take judicial notice of the fact that at that time the minimum hourly wage was $2.90. We disregard cost of living increases in the United States minimum wage law in our computations for the same reasons as noted above with respect to projected cost of living increases paid by the defendant to its employees. Accordingly, we do not consider in our computations the subsequent raises which have brought the minimum wage up to $3.35/hour currently, nor do we consider possible future increases.

5. As of the time of trial, plaintiff had received $33,079.14 in benefits under LHWCA. These will be an offset to the damage award, as will any such payments received by the plaintiff since that time.

6. We have computed the award as follows. At the time of the accident, plaintiff's annual wage was $26,025, and he had a work expectancy of 12.5 years.

$ 26,025	
x12.5	
$325,312.50	projected earnings without regard for inflation or cost of living increases.

Plaintiff could have taken up light work on July 1, 1979. We assume he would have earned the minimum wage for the rest of his working life. He had a work expectancy at that time of 11 years. At $2.90 per hour, his annual wage would have been $6,032.

$ 6,032	
x11	
$66,352	projected earnings at minimum wage.

We do not believe that there was sufficient evidence to establish a basis for estimating increased future productivity for the plaintiff, and therefore we will not inject such a factor in this award.

We believe that plaintiff is entitled to an award of $50,000 for his pain and suffering. In sum, we compute plaintiff's award as follows:

$325,312.50	projected earnings at present wage
−66,352.00	projected earnings at minimum wage
$258,960.50	
+50,000.00	pain and suffering
$308,960.50	judgment
−33,079.14	less compensation paid to date of trial
$275,881.36	final judgment less any compensation paid from date of trial to date of payment.

An appropriate order will be entered.

MAURICE B. COHILL, JR.
United States District Judge

Appendix B—Opinion of the District Court for Western District of Pennsylvania.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
owner or owner *pro hac vice* of Barges 1011,
1384, 1400, 1363 and others in a fleet,

Defendant.

Civil Action No. 79-1597.

ORDER

AND NOW, to-wit, this 15th day of April, 1981, for the reasons set forth in the accompanying opinion, it is ORDERED, ADJUDGED and DECREED that judgment be and the same hereby is entered in favor of the plaintiff and against the defendant in the amount of $275,881.36 less any benefits received by plaintiff under the Longshoremen's and Harbor Worker's Compensation Act from October 30, 1980, the date of trial, until the date of payment of the judgment by defendant.

MAURICE B. COHILL, JR.
United States District Judge

cc: Jerome M. Libenson, Esq.
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10th Floor Frick Bldg.
Pittsburgh, Pa. 15219

Robert W. Murdoch, Esq.
Jones, Gregg, Creehan & Gerace
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Office - Supreme Court, U.S.
FILED
NOV 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-131

IN THE

Supreme Court of the United States

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION,
owner or owner *pro hac vice* of Barges 1011,
1384, 1400, 1363, and others in a fleet,
Petitioner,

vs.

HOWARD E. PFEIFER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 14, 1982
CERTIORARI GRANTED OCTOBER 4, 1982

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* Not admitted into evidence by the Lower Court.

NOTATION:

The following items from the Third Circuit Court of Appeals have been reproduced in the Petition for Certiorari and the page references which follow are to pages in said Petition:

Opinion of Court of Appeals..... 1a
Judgment..... 17a
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Order Recalling the Mandate..... 24a

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

Relevant Docket Entries

November 6, 1979: Complaint filed.

November 6, 1979: Summons issued.

November 19, 1979: Summons ret 11/8 to J&L.

November 30, 1979: Answer filed by J&L.

May 22, 1980: Plaintiff's Pretrial Narrative Statement filed.

July 15, 1980: Defendant's Pretrial Statement filed.

September 11, 1980: Motion for Summary Judgment by defendant with proposed order.

September 15, 1980: Answer to defendant's motion for summary judgment and plaintiff's cross motion for sanctions, counsel fees and expenses filed.

October 2, 1980: Plaintiff's supplemental pretrial statement filed.

Relevant Docket Entries—Civil Action No. 79-1597.

October 28, 1980: NJ trial begun before Cohill, J (rep F. Jones).

October 29, 1980: NJ continues (court orally denies defendant oral motion for directed verdict)

October 30, 1980: NJ continues (court orally grants motion for non jury trial.).

January 6, 1981: Order entered on motion of 11/26/80 that the testimony in this case is closed. Counsel are directed to submit Proposed Findings of Fact and Conclusions of Law on or before January 20, 1981. (Cohill, J).

January 6, 1981: Non-trial trial memo filed (Rep. Jones) (case terminated this date per order this date).

April 16, 1981: Findings of fact and conclusions of law and order 4-15 that judgment is entered in favor of plaintiff, Howard E. Pfeifer and against defendant Jones & Laughlin Steel Corporation in the amount of $275,881.36 less any benefits received by plaintiff under the Longshoremen's and Harbor Worker's Compensation Act from Oct. 30, 1980, the date of trial, until the date of payment of the judgment by defendant (Cohill, J).

May 12, 1981: Notice of Appeal be defendant J&L from judgment entered 4/16/81.

May 12, 1981: Copy notice of appeals with docket entries; copy notice counsel.

May 27, 1981: Record and exhibits forwarded of appeals with docket entries in envelope.

May 27, 1981: Letter, docket entries counsel.

Relevant Docket Entries—Civil Action No. 81-1928

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1928

HOWARD E. PFEIFER,
Plaintiff-Appellee,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,
Defendant-Appellant.

Relevant Docket Entries

June 8, 1981: Appeal filed.

July 22, 1981: Appellee's Motion to Dismiss Appeal filed.

July 23, 1981: Reply to Appellee's Motion to Dismiss Appeal filed.

September 15, 1981: Order Dismissing Motion to Dismiss.

March 18, 1982: Oral Argument.

April 16, 1982: Opinion of Court of Appeals and Judgment entered.

April 30, 1982: Petition for Rehearing filed.

May 20, 1982: Sur Petition for Rehearing.

Relevant Docket Entries—Civil Action No. 81-1928

June 1, 1982: Amendment Sur Petition for Rehearing.

June, 1982: Certified Judgment in Lieu of Formal Mandate.

June 2, 1982: Motion for Stay of Mandate.

June 4, 1982: Plaintiff-Appellee's Answer to Motion for Stay of Mandate.

June 11, 1982: Order Recalling the Mandate.

July 13, 1982: Petition for Writ of Certiorari filed.

PLEADINGS

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

---

1. Plaintiff is an individual residing at Box 126-A, R.D. #1, Ford City, Armstrong County, Pennsylvania 16226.

2. Defendant is a corporation with its principal place of business in Pittsburgh, Allegheny County, Pennsylvania.

3. Defendant corporation at all times was doing business in the Commonwealth of Pennsylvania with an office for the regular transaction of business within the jurisdiction of this court was engaged in the business of owning and operating a fleet of vessels, boats and barges upon the Ohio, Monongahela and Allegheny Rivers and their tributaries, all of which are navigable waters of the United States.

4. At all times hereinafter mentioned, defendant owned, managed and operated or was owner *pro hac vice* of coal barges and at the time plaintiff herein was injured, had a fleet of about thirty five (35) coalbarges at its No. 1 Landing on the north side of the Monongahela River and used said vessels in the aforesaid navigable waters of the United States.

5. Jurisdiction herein arises under the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. Public Law No. 92-576, §18(a), 86 Stat. 1263, 33 U.S.C. §905 amending §5 of the Longshoremen's and Harbor Workers' Compensation Act, Ch. 509, §5, 44 Stat. 1426, 33 U.S.C. §905 (LHWCA).

6. On or about January 13, 1978, at about 4:00 A.M., plaintiff was employed by defendant as a longshoreman on coal barges on the Monongahela River near Hazelwood Avenue, Pittsburgh, Allegheny County, Pennsylvania, coal and loading docks of the defendant. The plaintiff was permanently employed by defendant on its coal barges as they were moved by defendant to its by-products plant on the Monongahela River and plaintiff's purpose in being aboard the barge was primarily to aid in and about its function of loading and unloading at the by-products plant of defendant, and plaintiff was a longshoreman within the purview of the said Longshoremen's and Harbor Workers' Compensation Act.

7. The duties of the plaintiff consisted *inter-alia* in caring for both empty or loaded barges on the river or at said docks, seeing that said barges were secured and chains tied. Plaintiff also operated loaded barges of coal on said Monongahela River to and from shore and move them on said Monongahela River from the loaded station

to the empty station as they were loaded and unloaded; said moving being for the purpose of having the coal removed therefrom and placed therein. Plaintiff helped and did inspect the same for water and possible leaks and whenever necessary, pumped water out of the said barges. Plaintiff also guided the captain of tows of incoming barges where to pilot the barge, and rode on the barges on the river, helping to secure them to other barges to form tows or fleets. It was also a part of plaintiff's responsibility to maneuver the barges up and down said Monongahela River in order to get them in a position for having coal placed therein and removed therefrom by defendant's other employees. After the barges were loaded or emptied, plaintiff's duties consisted of maneuvering said barges down the river to the pier operated by defendant at or near said docks and there making fast said barges preparatory to their being assembled as a part of a tow or fleet to be attached to a vessel and transported to their proper destination.

8. On January 13, 1978, plaintiff was carrying pumps to Barge No. 1384, which was owned by defendant, and was sinking. He was carrying a motor and breaker box on the gunnel of Barge No. 1011, owned by defendant, when he stepped on ice on the gunnel and both feet went out from under him and he landed on his tailbone and hip on the iron rail. When he fell, the motor came down on his lap. The barge upon which plaintiff was injured had been tied up there for more than a day and was loaded with coal. It was located in the center of the fleet.

9. The injuries and damages sustained by plaintiff were caused by defendant's negligence in the maintenance of the vessel and negligence in the equipment supplied therein, and more particularly described as follows:

(a) In failing to supply plaintiff with sufficient additional workmen to carry the pumps and the motors;

(b) In failing to furnish plaintiff with a reasonably safe place to work;

(c) In failing to shovel the snow off the gunnels of the barges or, in the alternative, to salt the gunnels which defendant had done on prior occasions;

(d) In failing, neglecting and omitting to keep defendant's barge in a seaworthy condition and reasonable state of repair;

(e) In failing to take proper and necessary steps to avoid injuries to the plaintiff;

(f) In failing to comply with governmental safety regulations;

(g) In violating the safety and health regulations for longshoremen;

(h) In failing to have a full work force when they knew or should have known that extra help in winter time when it is freezing, raining and snowing, are necessary;

(i) In otherwise being careless, reckless and negligent in the maintenance and operation of its vessels.

10. Solely as a result of the aforesaid negligence of defendant, plaintiff suffered the following severe and permanent injuries:

(a) Contusions of the coccyxgeal region;

(b) Pain in the nape of the neck and right thoracic lumbar region;

(c) Spasms and pain to his buttocks and lower back;

(d) Severe shock to his nervous system;

(e) Pain, suffering and inconvenience, past, present and future.

11. Solely as a result of the aforesaid negligence of the defendant, plaintiff was caused to sustain severe and painful permanent injuries and was incapacitated from attending to his usual duties and occupation and may in the future be permanently incapacitated, resulting in the suffering of the loss of earnings. He will be required to incur obligations for medical and surgical aid and attendant nursing care, and plaintiff was otherwise injured due to the damages in an amount in excess of Ten Thousand ($10,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against defendant in an amount in excess of Ten Thousand ($10,000.00) Dollars.

JURY TRIAL DEMANDED.

BASKIN AND SEARS
By JEROME M. LIBENSON, ESQ.
Jerome M. Libenson, Esq.
Attorney for Plaintiff

Summons

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon Jerome M. Libenson, Esq. plaintiff's attorney, whose address is 10th Floor, Frick Building, Pittsburgh, Pennsylvania 15219 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GILBERT W. (Illegible)
(Acting for the) Clerk of Court.

CAROL SPECTOR
Deputy Clerk.

[Seal of Court]

Date: NOV 6 1979

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Answer to Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

AND NOW, comes the defendant, Jones & Laughlin Steel Corporation, by their attorneys, Jones, Gregg, Creehan and Gerace and files the following Answer to Complaint.

FIRST DEFENSE

1. The plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

2. The defendant admits the averments contained in paragraphs 1, 2, and 4 of the Complaint.

3. The defendant denies as stated paragraph 3 of the Complaint. By way of clarification, the averments set

forth in paragraph 3 amount to only one aspect of the defendant's scope of business.

4. The defendant denies the averments contained in paragraphs 5, 6, 7, 8, 9, 10, 11 of the Complaint.

THIRD DEFENSE

5. The defendant avers that it is an employer under the Longshoreman's and Harbor Workers' Compensation Act, 33 USCA 901 *et seq.*, and as such has paid benefits to the plaintiff from July 21, 1977, and is continuing to pay such benefits.

6. The defendant avers that by reason of the Longshoreman's and Harbor Worker's Compensation Act the defendant is immune from liability to the plaintiff.

FOURTH DEFENSE

7. Plaintiff's right to recover, if any, for any alleged injuries are under the Longshoreman's and Harbor Worker's Compensation Act and therefore are barred in this suit.

FIFTH DEFENSE

8. Defendant avers that if there is jurisdiction that the plaintiff was contributorily negligent under the circumstances of this case and is barred from recovery, or in the alternative, his contributory negligence is pleaded in diminution of any damages he may have sustained.

SIXTH DEFENSE

9. Defendant avers that any accident sustained by the plaintiff and his resulting injuries, if any, were occasioned without the privity or knowledge of defendant, that the amount of the damages alleged in plaintiff's complaint may exceed the amount or value of defendant's interest in the barge on which plaintiff was alleged to have been working at the time of his alleged accident and its freight then pending, that the defendant hereby invokes the benefit of the provisions of the Revised Statutes of the United States and the Acts Amendatory thereto and Supplemental thereto in limitation of liability of shipowners under which provisions, should the defendant be held liable by reason of the matters, or any of them, set forth in plaintiff's Complaint, the plaintiff is not entitled to recover damages therefore, in a sum in excess of the amount of the value of defendant's interest in the said barge upon which plaintiff allegedly sustained his alleged accident and its freight then pending.

WHEREFORE, defendant denies that he is indebted to the plaintiff in any sum whatsoever and requests plaintiff's Complaint be dismissed with the costs upon the plaintiff.

JONES, GREGG, CREEHAN & GERACE
By: ROBERT W. MURDOCH
Robert W. Murdoch, Esquire
Attorney for the Defendant
1010 Grant Building
Pittsburgh, PA 15219
412/261-6400

Plaintiff's Pretrial Narrative Statement

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

Plaintiff, then age 53, was employed at the By-Product Coal Handling Department of Jones & Laughlin Steel Corporation (hereinafter referred to as "J & L"). On January 13, 1978, at about 4:00 A.M., plaintiff was employed by J & L as a longshoreman on its coal barges, about 35 in number, at its No. 1 landing on the north side of the Monongahela River and included among others Barges 1011, 1384, 1400, 1363 and the others in the fleet. Plaintiff was a longshoreman within the purview of the Longshoremens and Harbor Workers Compensation Act, 33 U.S.C. §905(6).

The duties of the plaintiff consisted of caring for both empty or loaded barges, individually and in fleets, on the river or at the docks and seeing that said barges were secured. Plaintiff also operated loaded barges of coal on said Monongahela River to and from shore and moved

them on said Monongahela River from the loaded station to the empty station as they were loaded and unloaded; said moving being for the purpose of having the coal removed therefrom and placed therein. Plaintiff helped and did inspect the same for water and possible leaks and whenever necessary pumped water out of the said barges. Plaintiff also guided the captain of tows of incoming barges where to pilot the barge and rode on the barges on the river helping to secure them to other barges to form tows or fleets. It was also a part of plaintiff's responsibility to maneuver the barges up and down the said Monongahela River in order to get them in a position for having coal placed therein and removed therefrom by others. After the barges were loaded or emptied, plaintiff's duties consisted of maneuvering said barges down the river to the pier operated by defendant at or near said docks and there making fast said barges preparatory to their being assembled as a part of a tow or fleet to be attached to a vessel and transported to their proper destination. Plaintiff had worked for defendant for 19 years prior to his injury.

On January 13, 1978, during a snowstorm, plaintiff was carrying pumps to Barge No. 1384, which was owned by defendant and was sinking. He was carrying a motor and a breaker box on the gunnel of Barge No. 1011 owned by defendant when he stepped on ice on the gunnel and both feet went out from under him and he landed on his tailbone and hip on the iron rail. When he fell, the motor came down in his lap. The barge upon which the plaintiff was injured had been tied up there for more than a day and was loaded with coal. It was located in the center of the fleet. Following his fall, plaintiff was

taken to the J & L dispensary and then to South Side Hospital. He further received out-patient treatment at Citizens General Hospital in New Kensington, Pennsylvania for therapy.

Plaintiff suffered the following severe injuries some of which are permanent: contusions of the coccyxgeeal region, pain in the nape of the neck and right thoracic lumbar region, spasms and pain to his buttocks and lower back, severe shock to his nervous system, pain, headaches, leg cramps while lying down, causing him to jump up at night, lower back pain, pain on walking or standing, and is permanently disabled from pursuing his former employment and occupation. Plaintiff, at the present time, can't get out of bed in bad weather, spends part of every day in bed, has to lay down from noon until 1:00 o'clock and then from 3:00 to 4:00 o'clock almost every day and always seems tired.

Wage Loss

Plaintiff was a head man, landing tender, a 13 point job at the time of his injury. He also, during his work experience with defendant, ran the hoist which was a 13 point job. His permanent rate as landing helper was a 7 point job. Plaintiff contends that about one half of his time at work was at a 13 point rate. The wage calculations hereinafter set forth are solely for the JC-7 wage rate plus C/L plus incentives and is the lowest of the classifications that he worked and is without regard to overtime or variation in the wage rate because of his performing the higher classified job (13 point). A supplemental pretrial statement will be supplied when the plaintiff's wage records are sent by defendant so that the

average overtime and average supplemental income is known. The wage rate and lost wages from January 13, 1978 through April 30, 1980 are $39,654.00 and are calculated in the table set forth hereafter and is without regard to the following paid holidays which were earned in 1978 through 1980:

1978 - 10 days
1979 - 11 days
1980 - 11 days

plus vacation for each year.

Schedule of Wage Loss

1/13/78 to	1/31/78	2 weeks at $7.39 per hr.	$ 591.20
2/ 1/78 to	4/30/78	3 months at $7.41 per hr.	3,853.20
5/ 1/78 to	10/31/78	6 months at $7.50 per hr.	7,800.00
11/ 1/78 to	1/31/78	3 months at $8.345 per hr.	4,339.40
2/ 1/79 to	4/30/79	3 months at $8.445 per hr.	4,391.40
5/ 1/79 to	7/31/79	3 months at $8.545 per hr.	4,443.40
8/ 1/79 to	10/30/79	3 months at $8.575 per hr.	4,459.00
11/ 1/79 to	1/31/80	3 months at $9.41 per hr.	4,893.20
2/ 1/80 to	4/30/80	3 months at $9.39 per hr.	4,882.90
			$39,654.00

Plaintiff had a work expectancy of twelve (12) years at the time of the accident of which ten years and one month now remain. Without regard to future increases and inflation, he would have earned $19,531.20 per year at the last pay rate or $196,939.00, a total wage loss past and future being $236,593.00 without regard to increases and variations in job rates and overtime.

Plaintiff's Pretrial Narrative Statement.

Witnesses Plaintiff Expects to Call

Walter Tadder - Liability
1411 Kenberma Avenue
Pittsburgh, PA 15216

Harvey Hicks
(Address Unknown)
c/o J & L Steel Corporation
3 Gateway Center
Pittsburgh, PA 15230

Joseph Novack, M.D. - Report to be filed
St. Francis Hospital
Pittsburgh, PA 15201
(Report attached)

A. El Attar, M.D. - Report to be filed
c/o South Side Hospital
South 20th & Jane Street
Pittsburgh, PA 15203

Samuel Sherman, M.D. - Report to be filed
3500 Fifth Avenue Building
Pittsburgh, PA 15213

George G. Gray, Jr., M.D. — Report to be filed
c/o Mercy Hospital
1501 Locust Street
Pittsburgh, PA 15213

Mercy Hospital
1501 Locust Street
Pittsburgh, PA 15213
(Records to be submitted when
produced by defendant)

Plaintiff's Pretrial Narrative Statement.

South Side Hospital
South 20th & Jane Street
Pittsburgh, PA 15203
(Records to be submitted when
produced by defendant)

Children, family and
friends of the plaintiff

Witnesses disclosed in Answers to
Interrogatories, depositions and any
records of the defendant

Statement of Damages

I. Lost earnings in excess of Longshoremen's Compensation.

II. Impairment of earning capacity.

III. Pain, suffering and inconvenience, past, present and future.

IV. Loss of life's pleasure.

V. Permanent disability.

VI. Unable to work around in his home and has to hire other people to do work previously performed by plaintiff.

BASKIN and SEARS
By JEROME M. LIBENSON
Jerome M. Libenson, Esq.
Attorney for Plaintiff

Defendant's Pre-Trial Narrative Statement

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

And now, comes the Defendant, Jones & Laughlin Steel Corporation, by its attorneys Jones, Gregg, Creehan and Gerace, and files the following Pre-Trial Narrative Statement in accordance with the Local Rules of Court:

Defendant denies that there is proper justification for this Honorable Court to bear this matter. §905(a) of the Longshoremen's and Harbor Workers' Act provides that the exclusive remedy that the longshoreman has, as long as payments are being made in accordance with the law, is the receipt of those payments. §905(b), the section under which this action is being filed, allows an action against the vessel as a third party. This may be well where the owner of the vessel is not the employer of

longshoreman. To allow this action where the employer does own the vessel only succeeds in contravening the statutory liability which the employer has, or creating a larger exposure on the employer's behalf.

Defendant will introduce evidence to establish that it provided a safe place to work and was not negligent in any respect. If in fact Plaintiff did receive any injuries, they were caused by his own negligent actions. Plaintiff has no right to recovery under the doctrine of unseaworthiness.

WITNESSES

1. Sherman Haddex	Jones & Laughlin Steel Corporation
2. Dave Curran	Jones & Laughlin Steel Corporation
3. Warren McCullough	Jones & Laughlin Steel Corporation
4. Walter Tadder	Jones & Laughlin Steel Corporation
5. James Murray	Jones & Laughlin Steel Corporation
6. Representative of Personnel	Jones & Laughlin Steel Corporation
7. Representative of Payroll	Jones & Laughlin Steel Corporation
8. Representative of Safety Department	Jones & Laughlin Steel Corporation
9. Representative of Medical Department	Jones & Laughlin Steel Corporation
10. Representative of Economics Department	Jones & Laughlin Steel Corporation

MEDICAL WITNESSES

1. Dr. El Attar	Jones & Laughlin Steel Corporation
2. Dr. Joseph Novack	St. Francis Hospital
3. Dr. Assanasen	New Kensington Hospital
4. Medical Records Librarian	Citizens General Hospital
5. Medical Records Librarian	St. Francis Hospital
6. Medical Records Librarian	Mercy Medical Center
7. Medical Records Librarian	South Side Hospital
8. Dr. Palmer	Mercy Medical Clinic

Defendant reserves the right to continue its investigation into this matter and to file supplemental Pre-Trial Statements up to the time of the trial. Defendant reserves the right to call any or all witnesses set forth in Plaintiff's Pre-Trial Statement, or anyone referred to or identified in discovery or in documents in this matter. Defendant reserves the right for an up-to-date medical examination of the Plaintiff.

JONES, GREGG, CREEHAN & GERACE
By: /s/ ROBERT W. MURDOCH
Robert W. Murdoch,
Attorney for the Plaintiff

Plaintiff's Supplemental Pretrial Statement

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff.

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

AND NOW, comes the plaintiff, Howard E. Pfeifer, by his attorneys, Jerome M. Libenson, Esq. and Baskin and Sears, and files the following Supplemental Pretrial Statement.

Plaintiff's Supplemental Pretrial Statement.

Calculation of Plaintiff, Howard E. Pfeifer's Lost Earnings From Date of Accident to Time of Trial

	Vodzak Higher Seniority Earnings	*Lower Seniority Earnings per J & L Statement*	*Average Lost Earnings*
1978	$26,484.00*	$22,587.00	$24,535.00
1979	$27,296.00	$25,783.00	$26,539.00
1980	$36,686.00**	$30,758.00**	$33,722.00
	Total lost earnings from 1978 through 1980		$84,796.00
	Less wages paid to plaintiff in 1978 prior to injury		1,530.00
			$83,266.00

* Sylvester Vodzak missed two months of work in 1978 and his 1978 earnings are calculated at twelve times his monthly average or 12 x $2,207.00. His actual 1978 earnings were $22,072.00, but he was off two months.

** The 1980 earnings were calculated on the average gross earnings per pay period and multiplying it by 26., *i.e.* Vodzak $14,106.00 to May 10, 1980 or 10 pay periods = $1,411.00 average; J & L statement $16,564.00 to July 19, 1980 14 pay periods = $1,183.00. The mean is $1,297.00 x 26 = $33,722.00 lost earnings for 1980.

Future Lost Earnings

Plaintiff has 9½ years of work expectancy as of January 1, 1981. His gross future lost earnings are $33,722.00 x 9½ years = $320,359.00, which reduced to present worth is $257,936.00.

In the alternative, an average annual wage of $30,000.00 per year or $285,000.00 gross earnings for 9½ years reduced to present worth is $230,670.00.

The present union contract in a Class 7 job calls for an increase from $9.36 the effective rate as of May 1, 1980 to $9.61 on August 1, 1981, an increase of 25¢ per hour ($520.00 per year) and an additional increase on August 1, 1982 to $9.81 of 20¢ per hour ($416.00 per year). There are also additional cost of living adjustments effective August 1, 1981 and August 1, 1982. The two pay raises of 25¢ and 20¢ per hour total 45¢ per hour, or $18.00 a week, equalling $936.00 per year. This rate will be in effect for the last 7½ years of Pfeifer's work expectancy and totals $7,020.00 is not included in either calculation which reflects the fairness of the figures utilized. No calculation has been made for future increases beyond the existing contract, nor inflation reflected in the cost of living index, although the Court can take judicial notice that the trend for the last twenty years has been steady increases.

Plaintiff will introduce OSHA Safety and Health Standards 29 C.F.R. 1918 concerning the longshoring industry.

Plaintiff will introduce the surface weather observations for Greater Pittsburgh Airport (Pennsylvania) January 12 and 13, 1978, copies attached.

BASKIN and SEARS
By JEROME M. LIBENSON
Jerome M. Libenson, Esq.
Attorney for Plaintiff

Plaintiff's Supplemental Pretrial Statement.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Supplemental Pretrial Statement was served upon counsel of record by mailing same to Robert W. Murdoch, Esq., 1010 Grant Building, Pittsburgh, Pennsylvania 15219 on the 2nd day of October, 1980

JEROME M. LIBENSON
Jerome M. Libenson, Esq.

Interrogatories

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

Plaintiff, by his attorney, Jerome M. Libenson, Esq. and Baskin and Sears, herewith files and serves upon defendant, Jones & Laughlin Steel Corporation, the following Interrogatories to be answered by defendant under oath within thirty (30) days, pursuant to the Federal Rules of Civil Procedure:

1. State the names and addresses of any eye witnesses to the accident complained of known to your agents or employees, attorneys or representatives.

ANSWER:

1. W. Tadder, 34821
1105 Fryberg Street
Pittsburgh, PA 15203

H. Hicks, 34684
2806 Jane Street
Pittsburgh, PA 15203

ANSWER:

13. Good.

14. State the exact location of the accident referred to in plaintiff's Complaint.

ANSWER:

14. Middle of barge fleet.

15. State in detail the manner in which you assert that the accident referred to in plaintiff's complaint occurred.

ANSWER:

15. Stepping from one barge to another. The barge from which Howard E. Pfeifer stepped from was slightly higher than the one stepped to, and Mr. Pfeifer claims he slipped on ice which was on the barge, which was his responsibility to have removed.

16. If you assert contributory negligence on the part of the plaintiff as a defense to this action, state in what particulars you allege the plaintiff was negligent.

ANSWER:

16. Howard E. Pfeifer had the responsibility to remove ice and snow, and failed to do so. Further, with the knowledge that there was ice and snow on the barge, plaintiff did not take proper precaution to protect himself from the injury.

Proposed Findings of Fact and Conclusions of Law

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

PLAINTIFF'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

AND NOW, comes plaintiff, pursuant to F.R.C.P. 52, and requests this Court make the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff is an individual residing at Box 126-A, R.D. #1, Ford City, Armstrong County, Pennsylvania 16226.

2. Defendant is a corporation with its principal place of business in Pittsburgh, Allegheny County, Pennsylvania.

3. Defendant corporation at all times was doing business in the Commonwealth of Pennsylvania with an office for the regular transaction of business within the

jurisdiction of this Court was engaged in the business of owning and operating a fleet of vessels, boats and barges upon the Ohio, Monongahela and Allegheny Rivers and their tributaries, all of which are navigable waters of the United States.

4. At all times hereinafter mentioned, defendant owned, managed and operated or was owner or *pro hac vice* of coal barges and at the time plaintiff herein was injured, had a fleet of about thirty-five (35) coal barges at its No. 1 landing on the north side of the Monongahela River and used said vessels in the aforesaid navigable waters of the United States. (Findings 1 to 4 are admissions from plaintiff's Complaint, Paragraphs 1 to 4).

5. Jurisdiction herein arises under the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. Public Law No. 92-576, §18(a), 86 Stat. 1263, 33 U.S.C. §903, amending §5 of the Longshoremen's and Harbor Workers' Compensation Act, Ch. 509, §5, 44 Stat. 1426, 33 U.S.C. §905 (LHWCA).

6. On January 13, 1978, plaintiff was employed by defendant as a longshoreman on the coal barges on the Monongahela River near Hazelwood Avenue, Pittsburgh, Allegheny County, Pennsylvania, coal and loading docks of the defendant, known as No. 1 landing.

7. Plaintiff was permanently employed by defendant on its coal barges as they were moved by defendant to its by-products plant on the Monongahela River, and plaintiff's purpose in being aboard the barges was primarily to aid in and about its function of loading and unloading at the by-products plant of defendant.

8. Plaintiff was a longshoreman within the purview of the Longshoremen's and Harbor Worker's Compensation Act.

9. Plaintiff has been receiving Longshoremen's and Harbor Worker's compensation continuously from the date of the accident, January 13, 1978 to the date of trial, October 28, 1980.

10. Plaintiff has been employed by defendant as a landing helper for nineteen (19) years. (Interrogatory 12).

11. Plaintiff on January 13, 1978 was working as head man.

12. Plaintiff was ordinarily classified as a landing helper, but worked as head man when there were vacancies due to vacations or illness of the regular head man.

13. The duties of plaintiff on January 13, 1978 consisted of monving loaded barges of coal to the coal hoist or elevator to be emptied into the defendant's coal bins, and moving the empty barges away from the coal hoist and tying them with other barges to be joined in a fleet and moved away. Plaintiff's further duties were to inspect the loaded barges in the fleet for possible leaks and, whenever necessary, pump water out of the leaking barges. Plaintiff worked with two other men on January 13, 1978, to-wit, Walter Tadder and Harvey Hicks, who were bargemen of barge helpers, and assisted in the same duties as the plaintiff.

14. Plaintiff was injured on the 12:00 A.M. to 8:00 A.M. shift of January 13, 1978. Sherman Haddix was the shift foreman.

15. The weather on plaintiff's shift on January 13, 1978 was snow and freezing rain. The weather report (Plaintiff's Exhibit "2") shows that the temperature was 22 degrees, that the snow depth was three inches on January 13, 1978, and further indicates that there was continuous snow fall from the beginning of the shift until the time of plaintiff's injury, so defendant had adequate notice of the slippery conditions.

16. It was the custom at the No. 1 landing to have salt stored in buckets or bags for use in salting the gunnels of the barges and to dissolve the ice on loads of coal (Testimony of Haddix, Pfeifer). There usually was salt available at the No. 1 landing in five-gallon paint buckets (Tadder).

17. Plaintiff nor his co-workers had any opportunity to leave the fleet at Landing No. 1 to obtain salt, nor was it ever the custom of plaintiff or his fellow workers to perform that duty. The placing of the salt was the daylight shift's job, and was the foreman's responsibility.

18. Plaintiff requested salt from the turn foreman, Sherman Haddix (testimony of Haddix, Pfeifer). Haddix responded to Pfeifer's request by stating that he had no one available to deliver it (Testimony of Haddix). This conversation was at approximately 12:30 A.M.

19. Haddix, in his accident report, Plaintiff's Exhibit "3", stated the unsafe act or practice was "not putting salt on icy barges". (Plaintiff's Exhibit "3", Part 18).

20. Defendant has "instructed all river crew to salt gunnels of barges" subsequent ot this claim. (Plaintiff's Exhibit "3", Part 26).

21. Defendant's witnesses in their testimony relative to the use of salt on gunnels was contradictory. David Curran testified that they don't salt the gunnels, whereas Sherman Haddix testified that they do and, in fact, in his report (Plaintiff's Exhibit "4") specified that the unsafe condition was the failure to salt the gunnels.

22. Defendant admits that "ice on gunnels of barges" is an unsafe condition (Plaintiff's Exhibit "3", Part 19). Defendant's failure to provide salt or to salt the gunnels was a proximate cause of plaintiff's injury.

23. Plaintiff, in addition to requesting salt, requested additional help from the defendant's foreman to shovel the snow off the gunnels prior to his injury. Defendant's failure to supply this additional help was a proximate cause of plaintiff's injury.

24. OSHA regulations (Plaintiff's Exhibit "11") required defendant to remove the snow from the gunnels of barges and not have a slippery surface. Defendant failed to comply with these governmental safety regulations and the safety and health regulations for longshoremen, which failure is negligence *per se* and was a proximate cause of plaintiff's injury.

25. There was a leaking barge present in the fleet when plaintiff's shift started because a pump in a gunnel at the quarter head was in operation at the start of the shift (Haddix, Tadder, Pfeifer). The leaking barge had a full load of coal and only one pump going when the turn started (Tadder).

26. At about 4:00 A.M. it was called to plaintiff's attention that the leaking barge was starting to sink and plaintiff instructed Tadder and Hicks to secure an additional pump because it was an emergency (Tadder, Pfeifer).

27. The pumps available the night of plaintiff's injury were more cumbersome and not as easy to connect to the electrical system as the pumps previously supplied, and the failure of the defendant to have adequate and sufficient equipment for workmen to carry the equipment provided constituted negligence in the maintenance of the vessel and equipment supplied, which was a proximate cause of plaintiff's injury.

28. The pump used herein consists of three parts; a leg or tube of metal with a propellor at the bottom approximately eight (8) feet long and weighing 80 to 90 pounds; an electric motor weighing approximately 80 pounds and being 12 inches by 18 inches, which is set in the leg, and an electrical connection. The operation of this pump required the insertion of an electrical line which was rolled from a heavy spool to make the pump function. It ordinarily took three men to assemble it. At about 4:00 P.M. on January 13, 1978 the barge with the one pump in it at the quarter head began to sink and upon inspection the men on that shift decided they needed an additional pump in the bulk head. Walter Tadder obtained the leg, Hicks obtained the electrical wiring and plaintiff went to the pump barge and found a motor and a breaker box. Plaintiff proceeded to walk from the pump house across the gunnel of a barge with the motor weighing 80 pounds on his right shoulder and the breaker box weighing approximately 5 pounds in his left

hand. He had traversed three quarters of the barge gunnel and had reached the quarter head and was in view of Tadder, who was on the sinking barge when both his feet went out from under him because of the ice and snow accumulated on the gunnel of the barge. The barge had been in the fleet for a period of at least a week.

29. There were approximately 3 to 4 inches of snow on the gunnel. No snow was shoveled from the barges on the shift on which plaintiff was injured. Plaintiff was walking, but could not avoid or break his fall because he was carrying the motor and breaker box and both his hands were fully occupied. Plaintiff landed on his tail bone and struck a barge rail and the motor fell on his lap. He injured his neck and the right side of his back. He suffered mild soreness to the nape of his neck, moderate severe contusions to the coccyxgeal region with swelling and complained of soreness to his thoracic lumbar region (Medical case record Plaintiff's Exhibit "4"). After some minutes, plaintiff carried the motor to the leaking barge at which point witness Tadder took the motor from plaintiff and with Hicks, inserted it into the pipe while plaintiff held the flashlight. Walter Tadder saw plaintiff fall and told him to wait and he would take the motor.

30. The sinking barge was only 2-½ to 3 inches above the water when plaintiff was carrying the pump motor and it was an emergency situation.

31. It had been the custom in the past for additional personnel to be utilized on snow and ice conditions. This procedure was sometimes called doubling out.

32. During the 12:00 to 8:00 turn on January 13, 1978, no snow was shoveled because the men working on the turn were busy moving barges and attending to the sinking barge which has a greater priority than snow shoveling or salting (Tadder). Some barges had broken loose earlier that night, which required an additional motor vessel to come up and bring them back into the fleet which took away from the time available to take care of the sinking barge earlier or shovel snow and ice (Tadder, Pfeifer). The third man on the shift that night, Harvey Hicks, was very inexperienced and not as much help as an experienced man would be with moving the barges and taking care of the fleet. In fact, Tadder had to stay close to him most of the time because the weather conditions, together with Hicks' inexperience, caused him concern (Tadder).

Damages

33. Plaintiff worked steadily for defendant for nineteen (19) years and was considered a good worker by his foreman (Haddix) and fellow employee (Tadder).

34. Plaintiff prior to his injury was able to perform all the job requirements, including tying and untying barges, carrying pumps, inserting them in barges, crawling in the empty barges to plug holes and any other activity necessary to accomplish the purpose of his job.

35. Plaintiff's back was black and blue and discolored and swelled up below the belt line immediately after his fall (Tadder).

36. Plaintiff, who never returned to work, is still suffering headaches and limitation of motion, he can't sit

long, that sitting makes him feel like he is sitting on golf balls, that he has pain in his neck, back and headaches.

37. Plaintiff testified that he went straight from work to the dispensary and was then taken to South Side Medical Center and x-rays were taken the same day of his accident.

38. Plaintiff testified that after he went home, he returned to the dispensary for x-rays and medication. In April, 1978 he was prescribed physical therapy by defendant's plant physician. He attended physical therapy at first three times a week and then once a week for a period from March of 1978 through April of 1979 and had a total of fifty-eight (58) visits at the Citizens General Hospital in New Kensington, Pennsylvania under the supervision of defendant's physician, Dr. El Attar. During this period he was seen by Dr. El Attar and consulting physicians to Dr. El Attar and given medication.

39. Plaintiff further testified that he has a seventh grade education and has no other job experience than heavy, outdoor, strenuous, laboring-type work.

40. Joseph Novak, M.D., a Board certified physician examined plaintiff on May 22, 1979 at the request of the Hartford Insurance Company and testified on behalf of plaintiff. Plaintiff had no independent medical treatment or examination of his own choosing.

41. Dr. Novak stated plaintiff gave him a history of falling with a big pump in his hand and hit his buttocks on a rail while a barge worker for J & L.

42. Dr. Novak testified that plaintiff could not do a sit up, that he had limitation of range of motion in his

back, and no muscle tone, which was the reason he could not do the sit up; that he had soreness and pain that felt like he was sitting on golf balls; that he had neck pain, continuous headaches, occipital and frontal; he had low back pain, pain in both hips and pointed to his buttocks; that by noon he is so painful he has to rest for about two hours and he had to go to bed early at night because of increasing pain; that he had been on pain medicine, Valium and others.

43. Dr. Novak stated that his examination revealed that he is skinny, muscular, walks stooped forward, has a flattening of his lumbar lordosis, has some limitation of motion of his lumbar spine, but he willingly went through the maneuvers. He was able to walk on his tiptoes and heels without any difficulty and had no sciatic stretch pain on straight leg raising; that his reflexes were 3 plus and active in both legs; that there were no atrophies visible and his muscles were normal. He further stated that he was unable to do a sit up because of low back pain.

44. It was Dr. Novak's opinion, within a reasonable degree of medical certainty, that the fall of January 13, 1978 was a superimposed trauma on the pre-existing condition of degenerative arthritis to the lumbar and cervical spine.

45. It was Dr. Novak's opinion, within a reasonable degree of medical certainty, that plaintiff was permanently disabled to do his work.

46. Dr. Novak stated that it was his opinion that plaintiff was limited to a very restricted sedentary light type of work and that he knew of no light duty that

could be performed at defendant's place of business, that he could only lift ten pounds and that twenty-five pounds would cause him to be very uncomfortable, and that he could only perform any activity for up to two hours at a time without having to rest.

47. Dr. Novak testified that he had reviewed the report of Dr. El Attar and Dr. Enrique and found no indication of a muscular dystrophy as reported by Dr. El Attar. He vehemently denied this diagnosis and further stated that he was eminently qualified to disagree with Dr. El Attar on this diagnosis. Dr. Novak further testified that he did not feel that Dr. Enrique's diagnosis was correct and speculated that he was practicing defensive medicine in regard to his diagnosis of motor neuron disease which he depicted as "The Lou Gehrig Disease". Dr. Novak stated that in his opinion plaintiff did not have a motor neuron disease, and that plaintiff would not be here today if he had it.

48. Dr. Novak testified that in his opinion, osteo arthritis can be present in a person for twenty years without the person knowing of this condition without trauma. It was his opinion within a reasonable medical certainty that the trauma; that is, plaintiff's fall on January 13, 1978, superimposed on his existing arthritis caused plaintiff's present permanent disability to perform his former occupation.

49. Plaintiff at defendant's request was seen in consultation by neurosurgeons, Hershey, Gray & Palmer, and Dr. Enrique, none of whom required any additional treatment or medical procedures, nor did any of the consultant physicians recommend plaintiff return to work.

50. Defendant's physicians did not perform any psychiatric tests, nor direct plaintiff to consult a psychiatrist, and Dr. El Attar's testimony concerning plaintiff's attitude is incompetent.

51. Defendant's certificate of March 16, 1979 states that plaintiff was totally disabled. (See Paragraph 2).

52. Defendant never offered plaintiff any job of any type after his injury. There was never any discussions by defendant to plaintiff of the opportunity or availability of a light duty job.

53. Testimony developed that it was the defendant's medical director's responsibility to recommend plaintiff to a light duty job if one was available (McCullough, El Attar).

54. Plaintiff never refused to return to work, but followed the medical advice and instruction of defendant's medical director, who told him not to return to work.

55. Defendant's medical witness further testified that the plaintiff was handicapped and could not work on the river.

56. Defendant's medical witness, Dr. El Attar was biased in favor of defendant.

57. Defendant has attempted to assert that there was a Class 2 janitorial position available for plaintiff, yet by their own witnesses admit that it was never offered to plaintiff, nor communicated to plaintiff and will be excluded from the Court's consideration.

58. Plaintiff applied for two jobs since his accident, but was unable to pass the physical examinations required, which proves impairment of his earning power.

59. If defendant is entitled to any set off for light duty work, it could not be janitorial at J & L which would require working for more than two (2) hours without resting, and would be very uncomfortable non-sedentary work, and plaintiff could not last long on a job requiring lifting of twenty-five pounds because Dr. Novak stated that plaintiff was unable to perform lifting in excess of ten pounds, nor any work above eye level, nor work for more than two hours without resting.

60. This Court takes judicial notice of the current minimum wage of $3.10 an hour times 40 hours per week or 2,080 hours per year equals $6,848.00 per year times 11 years of future work expectancy equals $70,728.00 as plaintiff's maximum potential earnings from light work.

61. Plaintiff's damages for lost earnings to the date of trial are $78,078.00. This is calculated at $24,535.00 as the average lost earnings for 1978, $25,539.00 average lost earnings for 1979; the 1980 earnings were $28,534.00 calculated at $1,297.00 per pay period for 22 pay periods, less a credit of $1,530.00 was deducted from these calculations for the plaintiff's earnings in 1978 (Plaintiff's Exhibits 2.1, 4.1, 10).

62. Plaintiff has an eleven (11) year work expectancy in accordance with the Table introduced into evidence at the trial.

63. The average wage of a person in plaintiff's position was $33,722.00 per year for the year ending 1980.

64. Defendant's witness, Randy A. Pingree, testified that cost of living raises in the last five years for hourly wage earners averaged 60¢ per year, which comes to $1,248.00 per year. This totals $82,368.00 on a cumulative basis for the next eleven (11) years.

65. The present union contract covering plaintiff has an increase of $936.00 per year effective August of 1982. Therefore, an additional $8,424.00 will be earned during the remaining nine (9) years from 1982 to 1991.

66. Plaintiff's total future lost earnings, including a cost of living increase, but without regard to inflation, are $461,683.00 which, added to the lost earnings to date of trial of $78,078.00, show his total past and future lost earnings to be $539,760.00.

$33,722.00 x 11	=	$370,490.00
60¢ x 2080 = $1,248.00 x 62	=	82,368.00
$936.00 x 9	=	8,424.00
		$461,683.00
		+78,078.00
		$539,760.00

67. Plaintiff's life expectancy is 19.7 years and he will suffer pain the rest of his life.

68. Plaintiff is also to be compensated with an adequate award for pain, suffering and inconvenience, past, present and future.

CONCLUSIONS OF LAW
Liability

1. This Court has jurisdiction under the Longshoremen's and Harbor Worker's Compensation Act, Ch. 509, §5, 44 Stat. 1426, 33 U.S.C. §905.

2. The reasonable care standard announced in *Kermarec v. Compagnie General Transatlantique*, 1959, 385 U.S. 625, 630-632, 79 S. Ct. 406, 3 L.Ed. 2, 550, has been adopted by the Third Circuit Court of Appeals in *Griffith v. Pittsburgh Wheeling Steel Corp.*, 610 F.2d 116 C.A. 3 (1979).

3. Whatever the conduct of a longshoreman's employer, a negligent shipowner is liable for the full amount of the longshoreman's damages. Longshoremen's and Harbor Workers' Compensation Act, §§5(b), 33(c) as amended 33 U.S.C.A. §§905(b), 933(c). *Griffith, supra.*

4. Those sections of the Second Restatement of Torts governing liability of possessor of land for dangerous conditions known to or discovered by the possessor and for known and obvious dangers do not define for all cases the appropriate standard of care under 1972 amendments to Longshoremen's and Harbor Workers' Compensation Act relieving vessel owners of absolute liability for injuries to stevedores and would be inconsistent with congressional intent to abolish doctrines of contributory negligence and assumption of risk in cases under the amendments. Longshoremen's and Harbor Workers' Compensation Act, §5(b) as amended 33 U.S.C.A. §905(b). *Griffith, supra.*

5. As regards liability of a vessel owner for injuries to a longshoreman, the standard of reasonable care under

the circumstances permits a finding of negligence on a showing: (1) that the vessel knew of or by exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition imposed an unreasonable risk of harm to longshoreman working on the ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoreman against danger. Longshoremen's and Harbor Workers' Compensation Act, §5(b) as amended 33 U.S.C.A. §905(b). *Griffith, supra.*

6. Where barge was delivered to steel company's landing by riverboat company and incorporated into a fleet under supervision of steel company's dock foreman and barge was in exclusive possession of steel company and movement thereof was responsibility of the foreman and steel company was free to choose which barges it could use for steel products, Longshoremen's and Harbor Workers' Compensation Act suit by injured employee was appropriate for application of the *Blair* doctrine, *i.e.*, holding employer liable as owner *pro hac vice.* Longshoremen's and Harbor Workers' Compensation Act, §5(b) as amended 33 U.S.C.A. §905(b). *Griffith, supra.* Therefore, the defendant, Jones & Laughlin Steel Corporation, is the owner or owner *pro hac vice* of the barges in the fleet when plaintiff, Howard Pfeifer, was injured.

7. Accumulations of ice and snow on vessels which cause personal injury has been considered an unseaworthy condition in other cases. *Dobbins v. Crane Brothers, Inc.*, 432 F. Supp. 1060 (1976). *Rich v. United States Lines, Inc.*, 596 F.2d 541 (1979) applies similarly

to negligence in Longshoremen's and Harbor Workers' Compensation Act cases if the defective or dangerous condition was known to the owner of the vessel and that the condition prevented the longshoreman from having a safe place to work. In the case at bar, the weather report shows an accumulation of snow, testimony showed that there was snow and rain on the prior shift, that plaintiff had requested salt and additional workmen to shovel the gunnels approximately 3-½ hours prior to his injury, and fully meets the criteria of defendant's owner having knowledge of the dangerous condition, which defendant failed to correct and prevent plaintiff from having a safe place to work which was the proximate cause of his injury. *Dodge v. Mitsui, Shintaku, Ginko, KK,* No. 73-852 (D.Or. 1974), aff'd. 528 F.2d 669 (9th Cir. 1975), cert denied 425 U.S. 944, 96 S. Ct. 1685, 48 L.Ed. 2d 188 (1976). Also see *Canizzo v. Farrell Lines,* 579 F.2d 682, 1978.

8. The evidence presented demonstrated that plaintiff slipped and fell on snow and ice allowed to accumulate on the gunnel of the barge, that the defendant as owner of the vessel is liable when a longshoreman slips on a gunnel when the ship owner had knowledge of the dangerous condition and that condition prevented the longshoreman from having a safe place to work. *Dodge, supra* and *Canizzo, supra.*

9. A longshoreman's injuries are recoverable if he demonstrates that the owner was negligent in failing to correct the dangerous condition of the vessel not created by the employee. In this case, the dangerous condition of snow and ice was created on the previous shift and attention to the condition was called to the employer's atten-

tion by Pfeifer's request for salt and additional help in shovelling the gunnels of the barges prior to his injury. The fact that a defective or dangerous condition made a vessel unseaworthy does not prevent a recovery by a longshoreman who was injured while working aboard the vessel if the owner was negligent in knowingly permitting the condition to exist, since negligence might be alleged and proved even though the condition might also constitute unseaworthiness. *Slaughter v. S. S. Ronde*, D.C. Georgia 1974, 340 F. Supp. 637, aff'd, 590 F.2d 973.

10. Defendant is the employer of plaintiff and also owner of the vessel. Defendant is negligent *per se* for its OSHA violations, *i.e.*, 29 CFR 1918.37 and 1918.91(a), 1918.91(c). *Dobbins v. Crain Bros., Inc.*, 567 F.2d 559, 568 (1977), *Blair v. U. S. Steel Corp.*, 312 F. Supp. 293 (1970).

11. There was no contributory negligence on the part of the plaintiff, nor any degree of comparative negligence.

Damages

12. Plaintiff, who has been injured by tortious conduct of the vessel, is entitled to award in damages commensurate with nature and extent of his injuries, to reimbursement for loss of earnings, past, present and prospective, for any impairment of his earning capacity, for medical expenses incurred and to be incurred and any other economic loss he may have sustained or is likely to sustain, and to redress for his physical injury, including effects thereof, such as pain, suffering, mental anguish, discomfort and inconvenience. *Downie v. U. S. Lines Co.*,

359 F.2d 344, certiorari denied 87 S. Ct. 201, 385 U.S. 897, 17 L.Ed. 2d 130.

13. Injured longshoreman is entitled to compensation, based on life expectancy at time of injury, for physical and mental effects of injury on his ability to engage in those activities which normally contribute to enjoyment of life, including, for example, his avocations. *Downie, supra.*

14. Specific elements which may enter into award of damages for longshoreman for physical and mental effects of injury on his ability to engage in activities which normally contribute to enjoyment of life necessarily depend upon the proofs and may include ability to dance, bowl, swim or engage in similar recreational activities and inability to perform customary household chores or engage in usual family activities. *Downie, supra.*

15. The evidence warrants this Court to award damages for permanent disability. *Comey v. Philadelphia Transaction Co.*, 175 Pa. 133, 34 A. 621 (1896). Further, permanent disability has been defined as the inability to perform any of the duties of any occupation which the plaintiff might be ordinarily capable of performing. *Moskowitz v. Prudential Insurance Co.*, 154 Pa. Super. 362, 35 A.2d 567 (1944). A person permanently disabled need not be a bedridden invalid. *Pearlman v. Metropolitan Life Insurance Co.*, 336 Pa. 444, 9 A.2d 432 (1939). *Piso v. Weirton Steel Co., Div. of National Steel Corp.*, Pa. Super. 345 A.2d 728.

16 An award of damages to plaintiff for his lost earnings past, present and future, and for pain, suffering and

inconvenience in the amount of $650,000.00 is not excessive under the evidence. See *Dobbins v. Crain Brothers, Inc.*, 432 F. Supp. 1060, aff'd. in part, reversed in part, 567 F.2d 559, (D.C. Pa. 1976). Award of $320,000.00 in damages to stevedore who was injured when he slipped and fell on snow covered barge deck was not excessive in view of evidence showing possible loss of wages to date of trial of over $50,000.00, future wage loss of several hundred thousand dollars, $7,500.00 in medical bills and considerable pain and suffering.

17. Plaintiff has suffered a permanent impairment of his earning capacity and his economic horizon is severely limited. See *Griffith v. Wheeling Pittsburgh Steel Corp.*, 452 F. Supp. 841. In determining award of damages for a claim for impairment of earning capacity, it is not the status of the immediate present which determines capacity for remunerative employment; where permanent injury is involved, the whole span of life must be considered and it must be determined whether or not the economic horizon of the plaintiff has been shortened because of the injuries sustained as a result of defendants' negligence. *Compare Kubrick v. U.S.*, 435 F. Supp. 166, affirmed and remanded 581 F.2d 1092, certiorari granted 99 S. Ct. 1211, reversed on other grounds, 100 S. Ct. 352 (1979) where plaintiff, who was 48 years of age, suffered from severe bilateral sensory nerve deafness which was irreversible, would have worked another 14 years and who, because of his disability, after rehabilitation, would be gainfully employed but with a reduction in earning capacity of 30% would be awarded total of $320,536.00 for past lost earnings, loss of future earning capacity, past and future pain and suffering and past and future medical expense.

Proposed Findings of Fact and Conclusions of Law.

18. Plaintiff does not have the training nor the physical ability to perform other work. In *McGinley v. U.S.*, 329 F. Supp. 62, the Court held: where 45-year old plaintiff who had suffered back injury which precluded him for continuing his former occupation as head stevedore foreman had been out of school for approximately 30 years and it would take a long time to complete necessary schooling so that he could be employed as a checker on waterfront, plaintiff had no duty to obtain employment as a checker to mitigate his damages.

19. Under Pennsylvania law, loss of earning capacity refers to disadvantage a plaintiff suffers in competing with uninjured persons in employment market and impairment need not necessarily be reflected in a loss of earnings, and, indeed, there may be a recovery, even if it can be shown that plaintiff received higher earnings after an injury than before. *Heckman v. Federal Press Co.*, 587 F.2d 612.

20. Medical testimony was not required to establish plaintiff's inability to work at former job where such inability was allegedly caused by pain which medical testimony had already established was result of accident in question. *Wagner v. Reading Company*, 428 F.2d 289 (1970).

21. Plaintiff Pfeifer has a permanent disability from his job. Compare *Blair v. United States Steel Corporation*, 312 F. Supp. 293 (1970). Evidence, in admiralty action by barge loader to recover from his employer for injuries sustained when he slipped on ice in barge while loading pipe, established that loader, who allegedly suffered from chronic posttraumatic syndrome

with cervical fibromyositis, who had eighth grade education, and whose work history involved only work of heavy nature, had partial and permanent disability.

22. Plaintiff's work record prior to the accident was good, he being a willing and cooperative worker at all times. *Blair, supra.*

23. According to the weight of the medical testimony, plaintiff must be considered to have a disability which is partial and permanent, precluding plaintiff from both heavy and most light physical work. His economic horizon is most limited in the competitive industrial market. *Blair, supra.*

24. Plaintiff has lost substantial wages, has a substantial permanent partial disability, and has, is and will continue to experience throughout the span of his life most grievous and nerve racking pain, suffering and inconvenience which is substantially aggravated on sustained physical effort and application of the use of the physical functions of his body. *Blair, supra.*

25. In considering damages in a personal injuries lawsuit, the monetary award must be based on the utilitarian value of the affected area of the body according to the importance that area bears to the whole map of economic effort. To a sedentary professional, a weak back might mean only the loss of his golf game, but to a longshoreman a weak back could mean the collapse of the ramp over which his wife and children climb to reach the plateau of wholesome living to which they are entitled. *Rice v. Philadelphia Transportation Co.*, 147 A.2d 627.

26. Plaintiff's damages will be awarded for lost future earnings that compensate him to the full extent of the injury sustained, and future inflation shall be presumed equal to future interest rates with these factors offsetting. *Kaczkowski v. Bolubasz*, No. 116 March Term, 1979, Supreme Court of Pennsylvania, filed September 22, 1980.

Respectfully submitted,

BASKIN AND SEARS
By JEROME M. LIBENSON
Jerome M. Libenson, Esq.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Findings of Fact and Conclusions of Law were served upon counsel for defendant by hand delivery of same to Robert W. Murdoch, Esq., Suite 1010 Grant Building, Pittsburgh, Pennsylvania 15219 on January 20, 1981.

JEROME M. LIBENSON
Jerome M. Libenson, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

DEFENDANT'S PROPOSED FINDINGS OF FACT

1. This Honorable Court does not have jurisdiction over the within action since the claim is not valid under the terms of the Longshoremen's and Harbor Workers' Compensation Act.

2. Plaintiff is an individual who resides in Ford City, Pennsylvania, who presently is 55 years of age and on January 13, 1978 was 53 years of age.

3. Plaintiff had been employed in various job capacities, beginning as a janitor, since 1959 and has worked in the By-Products Coal Handling Department of Jones & Laughlin Steel Corporation.

4. As part of its overall operation, defendant controls Landing #1 which is located on the north side of the Monongahela River which is used for the unloading of coal.

5. Plaintiff worked at Landing #1 for many years and was experienced as far as the duties of the various job positions on the river at that landing.

6. On January 13, 1978 plaintiff reported to work at Landing #1 at 12:00 a.m. and was assigned the duties of working as a headman.

7. As headman the plaintiff was in charge of the two other working men who help him perform the duties of keeping the barges secure and moving barges in and out underneath the coal hoist for unloading.

8. As other duties, the headman had the obligation to order barges, pump out barges and file reports.

9. At the time the plaintiff reported to work on January 13, 1978, there were snow flurries and the weather was cold. There were 2 inches of snow, but not on the gunnels of the barges.

10. There was no rising river conditions and there were no unusual circumstances which existed which necessitated the calling out of extra help. In fact, extra help was never called out under the circumstances and the Court finds there was an adequate number of workers to do the work.

11. As headman the plaintiff had not only the duty, but also the obligation to order and have available salt for use in melting ice and snow. And further, he had the authority to leave the area to get salt, and was told to do so.

12. Also working at the Landing #1 in aid of the headman, the barge helper and the landing helper, was a

motor vessel. The headman had the authority to use the crew members from the motor vessel, which was on lease to Jones & Laughlin Steel Corporation, to help move or secure barges, and could have used them to do so while he went for salt.

13. The headman had the authority to use the motor vessel to transport salt if it was deemed necessary to do so.

14. According to the testimony of Warren McCullough and the production records as submitted by Jones & Laughlin Steel Corporation, the 12-8 shift on January 13, 1978 was not busier than usual.

15. The lighting was adequate enough so that barges 3-4 widths out from the shore were illuminated.

16. There are records available from Jones & Laughlin Steel Corporation to show that neither Barge #1011 nor #1384 were present at Landing #1 on January 13, 1978.

17. Plaintiff was on the gunnel of a barge carrying a breaker box in his right hand and a pump on his right shoulder, which were being taken to be used to pump out another barge. There were no emergency conditions.

18. The carrying of the breaker box and the pump motor is a job which is normally performed by one individual.

19. The gunnel of the barge on which plaintiff was walking had some patches of snow but the gunnel was not completely covered.

20. That particular barge was in a position in the fleet whereby the lights from the shore would have illuminated the gunnel.

Proposed Findings of Fact and Conclusions of Law.

21. The foreman on the 12-8 shift on January 13, 1978, Sherman Haddix, helped put the pump into the sinking barge along with the plaintiff.

22. There were adequate pumps being used by the workmen at Landing #1 on January 13, 1978.

23. Plaintiff had fallen at the beginning of the 12-8 shift on January 13, 1978 on the pump boat without being injured.

24. At or about 8:00 a.m. on January 13, 1978 plaintiff reported to Sherman Haddix that he had fallen on a barge while carrying pump equipment to another barge.

25. It is the duty and obligation of the headman and those working under him to keep the gunnels free and clear of snow.

26. Plaintiff sought medical help and received medical care from Jones & Laughlin Steel Corporation.

27. Plaintiff has not returned to work since January 13, 1978.

28. Dr. Joseph Novak who examined the plaintiff testified that the plaintiff is not permanently disabled but is available for light work.

29. Dr. Danilo L. Enriquez performed Electromyographic studies and the results of those studies were consistent with a motor neuron disease.

30. Dr. Anas El Attar certified the plaintiff could return to work without restrictions on January 20, 1978.

31. Dr. El Attar issued a certificate setting forth that as of March 16, 1979 the plaintiff was totally disabl-

ed as a result of (a) advanced degenerative oseoarthritis, of the spine, cervical, thorasic and lumbar; (b) partial blindness and (c) generalized muscular dystrophy.

32. In his testimony Dr. El Attar stated that the term "muscular dystrophy" was not used in its popular sense but was used to describe a muscular weakness in order to help the plaintiff take the medical disability pension which plaintiff had requested.

33. Dr. El Attar stated that there was no disability whatsoever as of March 16, 1979 as a result of the alleged injuries of January 13, 1978, But plaintiff could not be reemployed by Jones and Laughlin as a result of Dr. El Attars Findings of March 16, 1979.

34. Plaintiff applied for and received benefits under the Longshoremen's and Harbor Workers' Compensation Act and has been paid since the date of making application up to the present time.

35. The payments made to the plaintiff under the Longshoremen's and Harbor Workers' Compensation Act as of October 31, 1980 amounted to $33,709.14 to which the defendant is entitled as a set-off to any sum up to that amount which plaintiff might receive under this action.

36. Plaintiff has failed to establish any negligence on behalf of defendant Jones & Laughlin for the alleged injuries suffered on January 13, 1978. Further, plaintiff is not entitled to recover for any injuries actually sustained as a result of a condition which existed for which he had full and complete responsibility.

37. In the alternative if it is determined that plaintiff is entitled to any monies, he is only entitled to those monies which are due from the date of the accident, January 13, 1978, until the time that he was certified permanently disabled and placed on pension, which was March 16, 1979. The lost wages for that time period were $24,535.00 for 1978 and $5,468.19 from January 1, 1979 to March 16, 1979.

38. Plaintiff has failed to establish that the defendant has any obligations to place him on light duty. Further, plaintiff can not expect the defendant to put him on light duty once he has been certified totally and permanently disabled as a result of medical conditions which do not arise out of the alleged incident of January 13, 1978.

39. Plaintiff has failed to mitigate any future losses of earning by failing to actively pursue gainful employment on his own. Plaintiff testified that he only inquired into two prospective jobs and did nothing further than make an inquiry.

40. If plaintiff in fact is to receive the total amount of $30,003.19, which the total of the figures set forth in paragraph 37 above, said amount is to be deducted from the amount of Longshoremen's and Harbor Workers' Compensation Act benefits.

41. Plaintiff has failed to introduce any evidence that there is any disability or impairment of future earning power as a result of the alleged injuries of January 13, 1978. On the contrary the only evidence is that any impairment of earning power in the future is solely as a result of the medical conditions which exist which have no tie-in with the incident of January 13, 1978.

42. Plaintiff is not entitled to any compensation for loss of future earnings or impairment of earning power. In the alternative if it is determined that Plaintiff is entitled to any compensation for future loss of earnings or impairment of future earning power, then from the amount which the court determines to be due, the court must deduct from that amount $205,576.80 being the amount of money which plaintiff could have earned while performing light duty for Jones & Laughlin Steel Corporation.

PROPOSED CONCLUSIONS OF LAW

1. This court has no jurisdiction over this matter in as much as Section 905(a) of the Longshoremen's and Harbor Workers' Compensation Act provides that payments under this act are the exclusive remedy of any employee. Plaintiff in fact has been receiving payments from the date of injury under this act and therefore is not entitled to bring this action and it is dismissed.

2. This court has no jurisdiction over this matter in as much as Section 905(b) gives the right to an injured employee to sue a vessel for negligence only if the vessel owner is not the employer of the injured party and therefore this suit is dismissed.

3. The burden of proof is upon the plaintiff to prove by common law negligence that any alleged injuries which he may have sustained were caused by the actions of the defendant. Plaintiff has failed to sustain this burden and has failed to establish negligence upon the defendant and therefore a verdict is entered against plaintiff and in favor of the defendant.

Proposed Findings of Fact and Conclusions of Law.

4. Plaintiff is not entitled to recover from the defendant for the alleged negligence in this case in as much as the alleged negligence was a situation over which the plaintiff himself had total control and responsibility.

5. In the alternative, if it is determined that there is in fact negligence of the defendant, the actions of the plaintiff in failing to take proper care of his own safety and to insure that the negligent condition did not exist is negligence, and said negligence of the plaintiff was 100% responsible for any injuries which the plaintiff may have suffered.

6. The cited areas of the Occupational Safety and Health Administration, in particular Sections 1918.91(a) (c) 1981.37(b), and 1910.16 are not applicable in the within case in as much as the plaintiff himself was responsible to insure that any conditions set forth in those sections did not exist or were controlled, and plaintiff can not take advantage of his failure to insure that these conditions did not exist and recover because of his own failure to do so.

7. Defendant has no obligation to find any light duty work for the plaintiff in light of the physical condition of the plaintiff as described by Dr. El Attar on March 16, 1979, which was the date the plaintiff was placed on a full disability pension. To require that defendant in fact return the plaintiff to a job would place an undue burden upon the defendant and could in fact place the plaintiff into a situation whereby he could become injured.

8. Plaintiff had a duty to mitigate damages by seeking employment but failed to do so.

9. Plaintiff failed to meet its burden of proof to establish that the incident of January 13, 1978 has led to any disability of the plaintiff from the date of that incident up to the time of this trial. In fact, plaintiff's own doctor, Dr. Joseph Novak, testified that there was no such disability and that the plaintiff could in fact perform light duty jobs. The testimony of Dr. El Attar was that there was no disability as a result of the alleged incident of January 13, 1978.

10. Plaintiff has failed to sustain its burden of showing permanent disability in the future from the date of the trial of this matter and further, plaintiff has failed to sustain a burden to show impairment of future earning power. Defendant on the other hand has established that any loss of earning power or any disability in the future of the plaintiff is as a result of medical conditions which are not connected with the incident of January 13, 1978.

11. If in fact plaintiff receives any compensation for either future loss of wages or impairment of future earnings, said amount must be reduced to its present worth.

12. On any amount which may be recovered by the plaintiff, defendant is entitled to a set-off up to the amount of $33,709.14.

Respectfully submitted,

JONES, GREGG, CREEHAN
& GERACE
By: ROBERT W. MURDOCH
Robert W. Murdoch, Esquire
Attorney for Defendant

Court's Findings of Fact and Conclusions of Law

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

Plaintiff, Howard E. Pfeifer, brought this action pursuant to the Longshoremen's & Harbor Worker's Compensation Act, §5(b), *as amended*, 33 U.S.C. §905(b), to recover damages from defendant, Jones & Laughlin Steel Corporation, for personal injuries allegedly sustained as the result of defendant's negligence. Pursuant to Fed. R. Civ. P. 52, we make the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff is an individual residing at Box 126-A, R. D. #1, Ford City, Armstrong County, Pennsylvania 16226.

2. Defendant is a corporation with its principal place of business in Pittsburgh, Allegheny County, Pennsylvania.

3. Defendant corporation is engaged, *inter alia*, in the business of owning and operating a fleet of vessels, boats and barges upon the Ohio, Monongahela and Allegheny Rivers and their tributaries, all of which are navigable waters of the United States.

4. At the time of plaintiff's accident, the defendant had a fleet of approximately thirty-five coal barges at its No. 1 landing on the north side of the Monongahela River and used said vessels in the aforementioned navigable waters of the United States. At all times hereinafter mentioned, defendant owned, managed and operated, or was owner *pro hac vice*, of said vessels.

5. Plaintiff was permanently employed by defendant for nineteen years as a landing helper on defendant's coal barges. The defendant moved barges to and from its by-products plant on the Monongahela River, and plaintiff aided in loading and unloading the barges at that plant.

6. On January 13, 1978, plaintiff reported to work at landing No. 1 at 12:00 A.M. Defendant assigned plaintiff the duties of a "head man." (Although ordinarily classified as a landing helper, plaintiff worked as head man when the regular head man was absent because of illness or vacation).

7. Plaintiff's duties on January 13, 1978 consisted of moving loaded barges of coal to the coal hoist or elevator to be emptied into defendant's coal bins, moving empty barges away from the coal hoist, and tying them with other barges to be joined in a fleet and moved away. Plaintiff's duties also included filing reports, inspecting the loaded barges in the fleet for possible leaks, and, when necessary, pumping water out of the leaking barges.

8. Two other bargemen or bargehelpers, Walter Tadder and Harvey Hicks, assisted plaintiff in his duties on January 13, 1978.

9. Plaintiff's accident occurred during the 12:00 A.M. to 8:00 A.M. shift on that date.

10. There was an accumulation of snow and ice on the gunnels of the barges where plaintiff was working. A weather report (Plaintiff's Exhibit "2") indicates that the temperature was 22 degrees, that there had been a two-inch accumulation of snow on January 12, 1978, and that an additional inch of snow fell between 12:50 A.M. and 6:50 A.M. (hours included in plaintiff's shift) on January 13, 1978.

11. It was customary at the No. 1 landing to have salt stored for use in salting the gunnels of the barges and dissolving ice on the loads of coal. The salt was usually available in five-gallon paint buckets. It also was customary for additional personnel to be used when there were snowy and icy conditions. This procedure was sometimes referred to as "doubling out."

12. At approximately 12:30 A.M., plaintiff requested salt from the shift foreman, Sherman Haddex. Haddex responded that he had no one available to deliver the salt.

13. In addition to requesting salt, plaintiff asked the shift foreman for additional help in shovelling snow off of the gunnels.

14. No snow was shoveled from the barges during plaintiff's shift because the men working that shift were busy moving barges and attending to a sinking barge.

(Some barges had broken loose earlier that night, requiring an additional motor vessel to come up and bring them back into the fleet. This reduced the time available to attend to the sinking barge earlier or to shovel snow and ice. In addition, the third man on the shift that night Harvey Hicks, was quite inexperienced and therefore provided less help than an experienced man might have in moving the barges and taking care of the fleet. In fact Tadder had to stay close to Hicks most of the time because the weather conditions, together with Hicks' inexperience, caused Tadder to be concerned about Hicks' safety.)

15. OSHA regulations (Plaintiff's Exhibit "11," pages 102, 103) required defendant to remove the snow from the gunnels of barges and not allow a slippery surface. Defendant failed to comply with these governmental safety regulations and the safety and health regulations for longshoremen.

16. At the start of plaintiff's shift, one of the barges in the fleet was leaking, and one pump in a gunnel at the quarter head of the barge was in operation. The leaking barge had a full load of coal.

17. At about 4:00 A.M. plaintiff learned that the leaking barge was starting to sink, and upon inspection the men on the 12:00 - 8:00 A.M. shift decided that the barge needed an additional pump in its bulkhead.

18. The pumps available on the night of plaintiff's accident were more cumbersome and not as easy to connect to the electrical system as the pumps which were usually supplied.

19. The pump that plaintiff used that night consists of three parts: a leg or tube of metal approximately eight feet long with a propellor at the bottom, weighing between 80 and 90 pounds; a 12-inch by 18-inch electric motor weighing approximately 80 pounds; and an electrical connection. The operation of this pump requires the insertion of an electrical line that was rolled from a heavy spool. Ordinarily three men are needed to assemble the pump.

20. Walter Tadder went to get the leg of the pump; Harvey Hicks went to get the electrical wiring, and plaintiff went to the pump barge and found a motor and breaker box. Plaintiff proceeded to walk from the pump house across the gunnel of a barge carrying the motor on his right shoulder and the breaker box, which weighs approximately 5 pounds, in his left hand. He had traversed three quarters of the barge gunnel and had reached the quarter head in view of Tadder, who was on the sinking barge, when both of his feet went out from under him because of the ice and snow accumulated on the gunnel of the barge.

21. Plaintiff could not break his fall because he was carrying the motor and breaker box. Plaintiff struck a barge rail and landed on his tailbone, with the motor falling onto his lap.

22. Plaintiff complained that his neck and the right side of his back were sore. (Plaintiff's medical case record (Plaintiff's Exhibit "4") states that plaintiff suffered mild soreness to the nape of his neck, and a moderate severe contusion to the coccygeal region with swelling and that he complained of soreness in his thoracic lumbar region.).

23. Walter Tadder, who saw plaintiff fall, took the motor off of plaintiff's lap, and together with Hicks, inserted the motor into the pipe while plaintiff held a flashlight.

24. The sinking barge was only 2-½ to 3 inches above the water when plaintiff was carrying the pump motor, and it therefore presented an emergency situation.

25. The testimony of defendant's witnesses regarding the use of salt on gunnels was contradictory. David Curran testified that the men do not salt the gunnels, whereas Sherman Haddex, the foreman, testified that they do.

26. Haddex stated in his accident report that "not putting salt on icy barges" was an unsafe practice. (Plaintiff's Exhibit "3," Line 18).

27. The report went on to note that in order to prevent similar accidents, the river crew was to be instructed to salt the gunnels of the barges. (Plaintiff's Exhibit "3," Line 26).

28. Defendant, through Mr. Haddex, admits that "ice on gunnels of barges" is an unsafe condition. (Plaintiff's Exhibit "3," Line 19).

29. The day of the accident, plaintiff went to defendant's dispensary to get medication and to have X-rays taken. Plaintiff was taken from the dispensary to South Side Medical Center where more X-rays were taken.

30. Plaintiff's back was black and blue and swollen below the belt line immediately after his fall.

31. In April, 1978, defendant's plant physician, Dr. Anas El Attar, prescribed physical therapy for plaintiff. On January 20, 1978, Dr. El Attar had certified that plaintiff could return to work without restrictions immediately, but plaintiff did not. Between April, 1978 and April, 1979, plaintiff went to Citizens General Hospital in New Kensington for physical therapy fifty-eight times.

32. At defendant's request, plaintiff was seen in consultation with neurosurgeons, Hershey, Gray & Palmer, and by Dr. Danilo L. Enriquez. None of these doctors required plaintiff to under go any additional treatment or medical procedures. None of the consultant physicians recommended that plaintiff return to work.

33. Dr. Enriquez performed electromyographic studies, the results of which were consistent with a motor neuron disease.

34. Dr. El Attar issued a certificate stating that as of March 16, 1979, the plaintiff was totally disabled as a result of (a) advanced degenerative osteoarthritis of the spine, cervical, thoracic and lumbar, (b) partial blindness, and (c) generalized muscular dystrophy.

35. In his testimony, Dr. El Attar stated that the term "muscular dystrophy" was not used in its popular sense, but rather, was used to describe a muscular weakness in order to help plaintiff qualify for the medical disability pension that he had requested.

36. Dr. El Attar testified that there was no disability whatsoever as of March 16, 1979 as a result of the alleged injuries of January 13, 1978, but plaintiff could not be reemployed by Jones and Laughlin as a result of Dr. El Attar's finding of March 16, 1979.

37. Joseph Novak, M.D., a Board certified physician, examined plaintiff on May 22, 1979 at the request of the Hartford Insurance Company; he subsequently testified on behalf of plaintiff. Plaintiff had no independent medical treatment or examination of his own choosing.

38. Plaintiff could not do a sit up, had limited range of motion in his back, and no muscle tone. He had soreness and pain that felt like he was "sitting on golf balls," neck pain, continuous headaches (occipital and frontal), low back pain and pain in both hips. He had to go to bed early at night because of increasing pain; he had been taking pain medicine.

39. Dr. Novak's examination revealed that plaintiff is skinny, muscular, walks stooped forward, has a flattening of his lumbar lordosis, and has some limitation of motion of his lumbar spine, but that plaintiff willingly went through the requested maneuvers. Plaintiff was able to walk on his tiptoes and heels without any difficulty and had no sciatic stretch pain on straight leg raising; his reflexes were 3 plus and active in both legs; there were no atrophies visible and his muscles were normal. Plaintiff told Dr. Novak that he was unable to do a sit up because of low back pain.

40. It was Dr. Novak's opinion, within a reasonable degree of medical certainty, that the fall of January 13, 1978 was a superimposed trauma on the pre-existing condition of degenerative arthritis to the lumbar and cervical spine.

41. It was also Dr. Novak's opinion within a reasonable degree of medical certainty, that plaintiff was

permanently disabled and unable to do the work that he formerly had performed.

42. Dr. Novak stated that it was his opinion that plaintiff was limited to a very restricted, sedentary, light type of work and that he knew of no light duty that could be performed at defendant's place of business.

43. Dr. Novak testified that he had reviewed the report of Dr. El Attar and Dr. Enriquez and found no indication of a muscular dystrophy as reported by Dr. El Attar. He criticized this diagnosis and further stated that he was eminently qualified to disagree with Dr. El Attar on this diagnosis. Dr. Novak further testified that he did not feel that Dr. Enriquez's diagnosis was correct and speculated that he was practicing defensive medicine in regard to his diagnosis of motor neuron disease, which he depicted as "The Lou Gehrig Disease." Dr. Novak stated that in his opinion plaintiff did not have a motor neuron disease and that plaintiff would not be here today if he had it.

44. Dr. Novak testified that in his opinion, osteoarthritis can be present in a person for twenty years without the person knowing of this condition. It was his opinion, within a reasonable degree of medical certainty, that the trauma, that is, plaintiff's fall on January 13, 1978, superimposed on his existing arthritis, caused plaintiff's present permanent disability and his inability to perform his former occupation.

45. When plaintiff underwent physical therapy treatments at Citizens General Hospital, New Kensington, Pa. (see finding No. 31), it was under the supervi-

sion of Dr. El Attar. He was also seen by other physicians and given medication.

46. Dr. El Attar testified that by March of 1979, plaintiff could have been active and could have lifted fifty pounds. Dr. Novak felt that plaintiff was capable of carrying ten to twenty-five pounds and could have held a job that might involve sitting, standing, walking or driving for periods of up to two hours, but at the end of such a two-hour period he would have to rest.

47. We find that after July 1, 1979, plaintiff would have been capable of doing light work which could involve lifting weights of not more than twenty-five pounds.

48. Defendant never offered plaintiff a job of any type after his injury. There were never any discussions between defendant and plaintiff regarding the availability of a light duty job.

49. The plaintiff could not work on the river.

50. Plaintiff's annual wage in 1978 was $26,065.

51. As of October 31, 1980 (the date of trial), plaintiff had received payments of $33,079.14 under the Longshoremen's and Harbor Workers' Compensation Act.

52. The legal minimum hourly wage in the United States in 1979 was $2.90, or $6,032 per year ($2.90 x 2080 hours).

53. Plaintiff has a seventh grade education and has no job experience other than heavy, outdoor, strenuous, laboring-type work. He had worked steadily for the defendant for nineteen years and was considered a good worker.

Court's Findings of Fact and Conclusions of Law.

54. Plaintiff applied for two jobs after the accident but was unable to pass the physical examinations required.

55. Plaintiff was born on June 27, 1925, was approximately 52½ years old when the accident occurred on June 13, 1978 and will be 65 years old on June 27, 1990, twelve and one-half years after the accident.

56. Plaintiff's work expectancy at the time of the accident and twelve and one-half years.

Conclusions of Law

1. This Court has jurisdiction pursuant to 28 U.S.C. §1333.

2. In 1972, Congress amended the Longshoremen's and Harbor Worker's Compensation Act of 1927 (hereinafter "LHWCA"), 33 U.S.C. §§901-950, fundamentally changing the basis for a longshoreman's action against a vessel owner. Under the Act as amended, a vessel owner is no longer strictly liable for a longshoreman's injuries on the basis of unseaworthiness or nondelegable duty, or for a stevedore's negligence under a *respondent superior* theory. Instead, "an owner [is] liable to an injured longshoreman only for its own negligence that proximately caused the injury." *McCarthy v. Silver*, 487 F. Supp. 1021, 1024 (E.D. Pa. 1980). *See Rich v. United States Lines, Inc.*, 546 F.2d 541, 545 (3d Cir. 1979).

3. The Third Circuit has held that "[Section] 905(b) imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case'

that would be applicable to a land based business." *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, 125 (3d Cir. 1979), *appeal pending*, 444 U.S. 1042 (1980).

4. Applying this standard, the *Griffith* court stated that a vessel could be found negligent on a showing: (1) that the vessel knew of or by exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would impose an unreasonable risk of harm to a longshoreman working on board the ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoreman against that danger. *Id.* at 126.

5. In *Griffith*, a barge was delivered to a steel company's landing by a riverboat company and was incorporated into a fleet there under the supervision of the steel company's dock foreman. The barge was in the exclusive possession of the steel company until the time of the accident; its movement was the responsibility of the foreman, and the steel company was free to choose which barge it would use for steel products. The Third Circuit found that these facts fit squarely within *Blair v. United States Steel Corp.*, 444 F.2d 1390 (3d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972), in which the Court held that a bailee in exclusive possession of a river barge is the owner *pro hac vice* of the vessel.

6. We find that the defendant, Jones & Laughlin Steel Corporation, was the owner *pro hac vice* of the barges in the fleet at its No. 1 landing on January 13, 1978.

7. Applying the standard of care set forth in *Griffith* to the facts of this case, we find that defendant, as owner *pro hac vice* of the barge on which plaintiff was injured, was negligent.

8. The weather report shows that there was an accumulation of snow and ice on the gunnels at the time of plaintiff's accident. Prior to the accident, defendant had requested salt, as well as additional workmen to shovel the snow.

9. Thus, the defendant knew of the condition on board the vessel that led to plaintiff's injury, knew that the condition imposed an unreasonable risk of harm to longshoremen working on the vessel, and failed to exercise reasonable care to protect the longshoremen against danger.

10. The evidence presented demonstrated that plaintiff slipped and fell on the snow and ice that defendant had allowed to accumulate on the gunnels of the barge, *i.e.*, defendant's failure to provide salt, or to salt the gunnels, and its failure to provide additional help to shovel snow and clear ice off the gunnels were the proximate causes of plaintiff's injury.

11. A longshoreman may recover damages for injuries he sustained if he demonstrates that the owner was negligent in failing to correct a dangerous condition of the vessel not created by the employee, and that the owner's negligence was the proximate cause of his injury. In this case, the dangerous condition caused by the snow and ice was created prior to and during plaintiff's shift and defendant had notice of the condition as a

result of plaintiff's request for salt and additional help in shovelling the gunnels of the barges prior to his accident.

12. There was no contributory or comparative negligence on the part of plaintiff.

Damages

1. On the basis of our Findings of Fact, we must award damages to plaintiff based on the following: 1) his complete inability to work from January 13, 1978, the date of the accident, until July 1, 1979, after which time we have found that plaintiff was capable of doing light work; 2) his reduced capacity for work from July 1, 1979 until his presumed date of retirement on his 65th birthday, June 27, 1990; and 3) pain, suffering, and inconvenience sustained.

2. Counsel for plaintiff has submitted, as proposed damages, a computation of plaintiff's estimated wages as an employee of the defendant from the date of the accident until his presumed date of retirement. He has included in this proposal cost of living raises predicated on the recent history of defendant's wage rates. We do not disagree with these projections, but feel they are inappropriate in view of the holding in *Kaczkowski v. Bolubasz*, _____ Pa. _____, 421 A.2d 1027 (1980).

This case sets forth a new procedure for computing damages in personal injury cases. The Supreme Court of Pennsylvania stated that

> Henceforth, in this Commonwealth, damages will be awarded for lost future earnings that compensate the victim to the full extent of the injury sustained.

> Upon proper foundation, the court shall consider the victim's lost future productivity. Moreover, we find as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting. Thus, the courts of this Commonwealth are instructed to abandon the practice of discounting lost future earnings.

Id. at _____, 421 A.2d at 1038-39.

3. We believe that it would be inconsistent with the *Kaczkowski* decision to build into a damage award projected cost of living increases, since this would give plaintiff a double consideration for inflation; it would permit plaintiff to have the advantage of the *Kaczkowski* case in which inflation is presumed to offset future interest rates while at the same time allowing him to insert cost of living increases into the award.

4. We have found that the plaintiff could have taken up light work on July 1, 1979. We take judicial notice of the fact that at that time the minimum hourly wage was $2.90. We disregard cost of living increases in the United States minimum wage law in our computations for the same reasons as noted above with respect to projected cost of living increases paid by the defendant to its employees. Accordingly, we do not consider in our computations the subsequent raises which have brought the minimum wage up to $3.35/hour currently, nor do we consider possible future increases.

5. As of the time of trial, plaintiff had received $33,079.14 in benefits under LHWCA. These will be an offset to the damage award, as will any such payments received by the plaintiff since that time.

6. We have computed the award as follows. At the time of the accident, plaintiff's annual wage was $26,025, and he had a work expectancy of 12.5 years.

$ 26,025	
x12.5	
$325,312.50	projected earnings without regard for inflation or cost of living increases.

Plaintiff could have taken up light work on July 1, 1979. We assume he would have earned the minimum wage for the rest of his working life. He had a work expectancy at that time of 11 years. At $2.90 per hour, his annual wage would have been $6,032.

$66,352	
x11	
$66,352	projected earnings at minimum wage.

We do not believe that there was sufficient evidence to establish a basis for estimating increased future productivity for the plaintiff, and therefore we will not inject such a factor in this award.

We believe that plaintiff is entitled to an award of $50,000 for his pain and suffering. In sum, we compute plaintiff's award as follows:

$ 325,312,50	projected earnings at present wage
– 66,352.00	projected earnings at minimum wage
$ 258,960.50	
+ 50,000.00	pain and suffering
$ 308,960.50	judgment
– 33,079.14	less compensation paid to date of trial
$ 275,881.36	final judgment less any compensation paid from date of trial to date of payment.

An appropriate order will be entered.

MAURICE B. COHILL, JR.
United States District Judge

Order

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

Defendant.

AND NOW, to-wit, this 15th day of April, 1981, for the reasons set forth in the accompanying opinion, it is ORDERED, ADJUDGED and DECREED that judgment be and the same hereby is entered in favor of the plaintiff and against the defendant in the amount of $275,881.36 less any benefits received by plaintiff under the Longshoremen's and Harbor Worker's Compensation Act from October 30, 1980, the date of trial, until the date of payment of the judgment by defendant.

MAURICE B. COHILL, JR.
United States District Judge

cc: Jerome M. Libenson, Esq.
Baskin & Sears
10th Floor Frick Bldg.
Pittsburgh, Pa. 15219

Robert W. Murdoch, Esq.
Jones, Gregg, Creehan & Gerace
1010 Grant Building
Pittsburgh, Pa. 15219

Transcript of Proceedings, October 28, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-1597

HOWARD E. PFEIFER,

Plaintiff,

vs.

JONES & LAUGHLIN STEEL CORPORATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

of non-jury trial held in the above-entitled action commencing Tuesday, October 28, 1980 and terminating Thursday, October 30, 1980 before the Honorable Maurice B. Cohill, Jr., District Judge.

APPEARANCES:

For the Plaintiff:

Baskin & Sears
10th Floor, Frick Building
Pittsburgh, Pa. 15219
By: Jerome M. Libenson, Esq.

For the Defendant:

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1010 Grant Building
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[2] (The following proceedings were held commencing at 10:20 a.m., Tuesday, October 28, 1980.)

Mr. Murdoch: Good morning, Your Honor.

The Court: Good morning.

Mr. Libenson, did you want to make an opening statement?

Mr. Libenson: Yes, Your Honor. I'll try to be somewhat brief.

If the Court please, I represent Howard Pfeifer, the plaintiff, in the suit against Jones & Laughlin Steel Corporation owner *pro hoc vice* of Barges 10, 11, 13, 84, 1400, 13, 63 and others in a fleet. The plaintiff is an individual who's been working for Jones & Laughlin Steel Corporation for 19 years. He was injured at work on January 13th, 1978 while working as the designation of headman at the No. 1 landing of the Coal Handling Division of the Byproducts Division of Jones & Laughlin. This is on the Allegheny River, Hazelwood in Pittsburgh and the job that the plaintiff was performing was maintaining the fleet of barges that are tied up for the coal elevator to take coal out of the barges onto a conveyor and into the mill. Plaintiff was injured on the 12 to 8 shift, had come to work at 12 o'clock and we will introduce the weather reports for that day and the previous day show that it had been snowing from about 10 o'clock the evening of the [3] 12th and continued on through the 13th. Plaintiff was injured at about 4 o'clock on that shift when he and the two men that were assigned to work with him were attempting to save a loaded coal barge from sinking by inserting a pump into the barge to pump out water that was filling up the bulkhead and this barge was lower in the water than the others.

The system that they had at J & L at that time was a three-piece barge consisting of an electric motor with a circuit breaker.

The Court: You said a three-piece barge. You mean a pump?

Mr. Libenson: Pump. Excuse me, Your Honor.

The pump had a pipe like attachment which weighed about 80 pounds and this was the stem or stand and one man carried that and another man carried the motor—switchbox but the motor itself was about 80 pounds. The pipe was about 30 pounds. The third person brought in a reel of wire and they had to hook it all up to make the pump functional and on the night in question they had already put most of the barges in place for the coal lift and Mr. Pfeifer noticed that this particular barge was very close to sinking and it was loaded and it was an emergency and the two other men working with him had gone ahead of him with the stem apparatus and the other fellow brought the coil of wire. Mr. Pfeifer was carrying a motor on his shoulder with a switch circuit breaker or [4] switchbox in the other hand and the way you get around on the river is you walk to gunnels of the barges because they're all out on the fleet and he had traversed the stern of one barge and was on the gunnel of the barge that he fell on. He had gone about three quarters of the way on it and his feet went out from under him because there was snow and ice on it and the motor came down in his lap after he had fallen. He had fallen against a raised rail of about two inch rail that they have on these barges and hit his coccyx and his tailbone and the motor came down in his lap and he was injured. He was, however, able to get up after a few

minutes and get the motor over so they could connect it up and the barge wouldn't sink.

Mr. Pfeifer then finished up his reports and he hasn't worked since that day and his injuries are that he has a soreness in the nape of the neck, swelling and soreness of the thoracic lumbar area and he's experienced continuous headaches. He gets continuous soreness of his back and of his buttocks. He can't seem to function for more than two or three hours without requiring rest. He gets tremendous cramping in his legs and he just can't seem to get it together at this point. It's a man that had worked for 18 years steadily in this kind of work which requires constant carrying of pumps, motors, lines, jumping, a lot of agility. They have to in this work put wedges into—pegs into leaks [5] and put out lines and lights at night and so forth.

The plaintiff's theory of negligence is that the defendant failed to supply plaintiff with sufficient additional workmen because of the weather conditions and the condition of the fleet, failing to furnish plaintiff with a reasonably safe place to work, failing to shovel the snow off the gunnels or in the alternative salt the gunnels which they had done on prior occasions and failing to keep their barges in a seaworthy and reasonable state of repair, failing to take proper and necessary steps to avoid the injuries, failing to comply with Governmental safety regulations and violating the safety and health regulations for longshoreman, OSHA and failing to have a full workforce when they knew or should have known that extra work in the wintertime when it's freezing, raining, and snowing is necessary and otherwise being

careless and wreckless and negligent in the maintenance operation of the vessels.

We will offer in evidence the testimony of the plaintiff, an eyewitness plus medical testimony. I think we have an agreement—I have an agreement with counsel as to the rates of wages at the time and the future contract and we have gone through discovery, we have developed a mean wage; in other words, we have obtained the wages since my client has been injured of the next highest and next lowest person in seniority and in my pretrial statement, I have set forth the [6] average between these as the wage that the plaintiff would have earned had he stayed on the job and we have also in the pretrial statement calculated the loss to future earnings and I would like to advise the Court that subsequent to the filing of the last pretrial statement, the Supreme Court of Pennsylvania came down in the Kaczkowski case—

The Court: Is that the new computation on wages?

Mr. Libenson: Yes, Your Honor.

The Court: I have a copy of it.

Mr. Libenson: You just multiply the last earnings times the work expectancy and there's a built-in setoff for inflation and reduction of present worth so you ignore both and as I understand the case, you just calculate the work expectancy times the wages at the last time it can be calculated. In this case, it would be I guess the contract runs through 1982 and in my pretrial statement, I have calculated that and I would request the Court ignore the reduction of present worth but use the actual multiplied calculation which I think are the appropriate lost earnings here. That would be our case plus pain, suffering and inconvenience.

The Court: Mr. Murdoch, did you care to make a statement at this time?

Mr. Murdoch: Not a statement, Your Honor, as far as the case itself but I would like to address myself to two [7] points. One, in chambers we had discussed the stipulation that Mr. Libenson and myself had talked about regarding medical testimony and I know Mr. Libenson is planning on having his doctor come in to testify. I just want to make sure that we clarify on the record that our oral understanding is that I would still be able to submit reports of doctors without calling them.

Is that your understanding of what we discussed?

Mr. Libenson: I'd like to withdraw but I made that commitment so—

Mr. Murdoch: All right, sir.

Mr. Libenson: Because frankly, what happened, Your Honor, is we talked about putting the statements in and the question of causation wasn't discussed and when I sent Mr. Murdock a written stipulation, it included the term "causation" and none of the letters have causation one way or the other. They're just void on the point and Mr. Murdoch raised that point so I'm going to have to bring Dr. Novak in to overcome that point unless the Court says I don't have to but he is correct I did make that agreement that we would put these reports in and I'm not going to withdraw that.

Mr. Murdoch: I still have one doctor present here, Your Honor, but I have two other doctors whose reports I would submit.

The second point I wanted to address myself to was [8] to the recent case that was decided up the street. We're here today under a Federal statute under Federal law and I don't think that the finding of the Pennsylvania

Supreme Court in the recent case regarding not reducing damages to present worth is applicable in this particular case.

The Court: We may have to have a little argument on that at some point.

Mr. Murdoch: Yes, sir.

Mr. Libenson: Under Federal law, you can add inflation.

Mr. Murdoch: If we have expert testimony.

The Court: That's a little bit down the road and we'll wait on that.

Mr. Libenson: May we proceed?

The Court: Please.

HOWARD E. PFEIFER the plaintiff, being called as a witness, first being duly sworn, testified as follows:

Mr. Libenson: If it please the Court, before I interrogate the witness, I'd like to read some admissions into the record.

The first paragraph of the Complaint is admitted. Plaintiff is an individual residing at Box 126A, R. D. 1 Ford City, Armstrong County, Pennsylvania 16226.

Second paragraph is admitted. Defendant is a [9] corporation with its principle place of business in Pittsburgh, Allegheny County, Pennsylvania. And the fourth paragraph is admitted. At all times hereinafter mentioned defendant owned, managed and operated or was owner *pro hac vice* of coal barges and at the time plaintiff herein was injured had a fleet of about 35 coal barges at its

No. 1 landing on the northside of the Monongahela River and used said vessels in the aforesaid navigable waters of the United States.

Your Honor, paragraph 3 is denied in this manner and I'd like to read it but I want to point out the answer. "The defendant denies as stated Paragraph 3 of the Complaint. By way of clarification, the averments set forth in Paragraph 3 amount to only one aspect of the defendant's scope of business."

If he's admitting that what I said is so without covering his entire business, I'd like to read in Paragraph 3.

The Court: Any comment on that, Mr. Murdoch?

Mr. Murdoch: I have no objection, Your Honor.

Mr. Libenson: May I read it in then, please?

The Court: Yes.

Mr. Libenson: Paragraph 3. "Defendant corporation at all times was doing business in the Commonwealth of Pennsylvania with an office for the regular transaction of business within the jurisdiction of this Court was engaged in the business of owning and operating a fleet of vessel boats [10] and barges upon the Ohio, Monongahela and Allegheny Rivers and their tributaries, all of which are navagable waters of the United States."

I would also, Your Honor, like to offer in evidence a document which was produced by the defendant on a motion to produce called "Employer's Report of Occupational Injury or

Disease" which was attached to that and I'd like to mark it Plaintiff's Exhibit 1 and I'd like to offer in evidence as Plaintiff's Exhibit 2 certified copy of the weather conditions which were attached to the plaintiff's supplemental pretrial statement.

The Court: Any objections to 1 or 2, Mr. Murdoch?

Mr. Murdoch: No, Your Honor.

The Court: 1 and 2 are admitted.

Mr. Libenson: I put a paper clip, Your Honor on the last sheet January 13th, 1978.

The Court: Last sheet of Exhibit 2?

Mr. Libenson: Of Exhibit 2 which shows the snowfall at the particular times.

The Court: May I see 1?

(Exhibit was handed to the Court.)

Mr. Murdoch: May I see it?

(Exhibit was shown to Mr. Murdoch.)

The Court: Did you see No. 1?

Mr. Murdoch: No, Your Honor.

[11] Mr. Libenson: I'd also like to put in evidence the document which defendant attached to its answers to interrogatories called "Foreman's Report of Accidental Injury" which was in response in Interrogatory 6, stated, "If any statements were taken from any of the persons mentioned above—" meaning all of the witnesses listed—"as being a witness to any phase of the accident set forth in plaintiff's Complaint and such statements are—

The Court: Do you have when that was filed so I can find it in here?

Mr. Libenson: Yes.

The Court: About—

Mr. Libenson: I'll look at the affidavit. The affidavit was April 25th, 1980.

The Court: April 25th?

Mr. Libenson: Yes, Your Honor.

The Court: Okay. I have it now. Was the exhibit attached to the answers?

Mr. Libenson: Yes, Your Honor.

The Court: All right and this is the document entitled "Foreman's Report of Accidental Injury"?

Mr. Libenson: Yes, Your Honor.

The Court: That's marked Plaintiff's 3?

Mr. Libenson: It's a two-page exhibit, yes, and I'd like it to be marked as Plaintiff's Exhibit 3.

[12] The Court: Any objection to the admission of that Mr. Murdoch?

Mr. Murdoch: No, Your Honor.

The Court: Exhibit 3 is admitted.

Mr. Libenson: And also I'd offer the additional report which was attached to the same set of interrogatories and I'm not sure that you put a separate number on that at all.

The Court: Is that the one called "Medical Case Record"?

Mr. Libenson: Yes, Your Honor, and I'd mark that Exhibit 4.

The Court: Any objection to No. 4, Mr. Murdoch?

Mr. Murdoch: No, Your Honor.

The Court: Exhibit 4 is admitted.

Mr. Libenson: I'd also like to read into the record answer to Interrogatory 12. The question was, "State how long plaintiff had been working for you prior to the date of accident complained of and what capacity and attach all personnel records."

"A: 19 years as a landing helper."

DIRECT EXAMINATION

By Mr. Libenson:

Q. Will you please tell the Court your name? A. Howard E. Pfiefer.

Q. Your address? [13] A. Box 126A, R. D. 1 Ford City, Pa.

The Court: Can you hear him all right, Mr. Murdoch?

If you just kind of talk right into that microphone—

By Mr. Libenson:

Q. What is your age? A. 55.

Q. When was your birthday? A. June the 27th.

Q. When were you born? A. 1925.

Q. Are you married or single? A. Divorced.

Q. Do you have any children? A. I have seven children.

Q. How many are there living? A. I have six living.

Q. Are they all of age? A. Yes, sir.

Q. By whom are you employed? A. I'm employed by Jones & Laughlin Steel Corporation.

Q. How long were you employed by them? A. Since March 5th of 1959, 19 years.

Q. Prior to that, who did you work for? [14] A. Brown Dairy driving a truck.

Q. Before that? A. Alcoa Company.

Q. What's the extent of your education? A. Seventh grade.

Q. How old were you when you got out of seventh grade? A. About 16.

Q. What did you do then? A. Worked for a strip mine for awhile then I went to Alcoa.

Q. Relative to your job at Jones & Laughlin Steel Corporation, what capacity or what kind of a job did you have when you started? A. I started in as a janitor.

Q. How long were you doing that? A. Just a short while, a matter of a few months and I moved to barge helper.

Q. What is a barge helper and where do you do that job? A. A barge helper is down under the elevator. We used to shovel the barges and they quit it and now we're changing barge at the elevator.

Q. Is that job on the river? A. Yes, sir.

Q. How many people work on a shift down there and what [15] do they do?

Mr. Murdoch: Is this as of the time of the accident?

Mr. Libenson: Let's back up then.

By Mr. Libenson:

Q. How long were you a barge helper? A. Three years.

Q. Where did you work as a barge helper? A. J&L at Hazelwood.

Q. What did your job as a barge helper cover? A. It consisted of at that time we cleaned the barges. We had to change barge.

Q. When you say change barge, what does that mean? A. Take an empty out, take it down below and tie it up and it was our part of the job.

Q. Where did you work? Did you work on the river? A. On the river all the time.

Q. Did you wear life jackets? A. Yes, sir.

Q. Hard hat? A. Hard hat and life jackets.

Q. Would these barges be floating on water at this time? A. Yes, sir.

Q. When you say changing them, how do they do that? [16] A. You've got to take the empty barge and you've got to take the cables off and walk them around to hand to the other man to hand on the other barge to put on the full one while they're floating down the river and you have a man on the cribbing that keeps the line on them at that time to keep them into the cribbing.

Q. Is there a boat as compared to a barge that assists in this? A. Later we got the boat but when we first started to break in, we done it by hand.

Q. What kind of boat did they get? A. A little tug.

Q. What was this used for? A. Help them change barge, help them move barges out of the landing.

Q. Would this pull and push the barges? A. Yes, sir.

Q. You say you were a barge helper, is that— A. Barge helper.

Q. And you were that for two or three years? A. Yes, sir.

Q. What was your next job? A. I moved up to the oiler job.

Q. What does that mean? A. It was oiling the elevator at that time before they [17] put the automatic oilers on and you had to load coal cars and so on like that with coal.

Q. Was this an increase in salary or in your wages? A. Yes, sir.

Q. What class job was that? Do you remember? A. It was still a 5 class job but as a barge helper but it was a move up.

Q. How long were you an oiler? A. Just for a year or so.

Q. Then what was your next classification? A. I moved up onto the landing as a landing helper.

Q. What were you called at that point? A. A landing helper.

Q. What does a landing helper do? A. Sets up the elevator, moves barges out of the fleet, ties up and secures barges when the boat brings them in, pumps barges.

Q. How long were you in this classification? A. I worked from then on and I was still just working part time whenever I got hurt.

Q. As a landing helper? A. When I was—I got hurt, I was a headman but up until then—

Q. How long were you a landing helper in years? A. When I moved up from oiler—

[18] The Court: I couldn't hear you, sir.

A. I said ever since I moved up from oiler.

Q. What year was that do you recall approximately? A. Around '64, '65.

Q. And you were injured what date? A. January the 13th.

Q. 19– A. 78.

Q. So for about 13 years you were a landing helper, is that right? A. Yes, sir.

Q. On occasion did you do other jobs other than landing helper? A. I worked as headman on occasions to fill in.

Q. What would cause you to become as you call headman? A. Somebody else sick, somebody on vacation. It was a move up.

Q. Did you get paid at a different rate for that? A. Yes, sir.

Q. What was the headman's job as compared to the landing helper? A. He had to give the order what barges to get out and help get them out and what barges to check the fleet to make sure they were pumped and make sure the reports were made out.

Q. On an ordinary day, how many people worked at No. 1 [19] landing with you if you were headman?

Mr. Murdoch: As of the time of the accident again?

Mr. Libenson: I just asked him on an ordinary day.

Mr. Murdoch: I object unless I know what time period because this has changed during the years.

The Court: It should be limited to a time period.

By Mr. Libenson:

Q. On the day of the accident, which was January 13th, 1978, what was your classification? A. I was a headman.

Q. When did you know you would be headman? A. I had been working on a move up.

Q. What shift were you injured on? A. The 12 to 8 shift.

The Court: 12 midnight—

The Witness: 12 midnight, 8 a.m. in the morning.

By Mr. Libenson:

Q. On the No. 1 landing, is that—How is that operated? Is it operated around the clock? A. Around the clock, yes, sir.

Q. Do they have a shift of bargemen helpers, landing men on all shifts? A. Yes, sir.

Q. Do they load coal—unload coal with the elevator on all shifts? [20] A. No, sir. The 4 to 12 shift and the 12 to daylight load for repairs.

Q. You were working 12 to 8, is that right? A. Yes, sir.

Q. The day on January 13th, 1978, how many men were working under you that day? A. Two men.

Q. Who were they? A. Walter Tadder and Harvey. Hicks is his last name.

Q. Had you worked with Mr. Hicks before? A. No, sir, first time.

Q. Was he a—What was his classification if you knew? A. I don't know if he was working barge helper or bargeman. I don't know.

Q. Had you worked with Mr. Tadder before? A. Yes, sir.

Q. What was his classification? A. I don't know which one was moved up ahead.

Q. Were these two men to work under you on that day? A. Yes, sir.

Q. Were there any other people working at the No. 1 landing? A. Not on my turn.

Q. What were the weather conditions on that day when [21] you got to work? A. Snow. It was snowing pretty good and it was pretty much snow. It fell a couple inches or so and it was snowing all evening there, all night I should say.

Q. When you got to the landing, what time do you usually get there on a 12 to 8 shift? A. I usually got there about 11.

Q. What did you do when you got there? A. Changed clothes and checked over the reports from the previous shift.

Q. On that previous shift did you notice anything about—from their reports? A. Yes. They had been down awhile. They had some down time for some reason on the elevator.

Q. In connection with this whole operation of No. 1 landing and the elevator, what's the priority of how you're supposed to operate when you work? A. Your first priority is to service the elevator, keep it running, not to hold the elevator up then your next priority—

Q. This is the coal elevator? A. Coal elevator.

Q. What does this coal elevator do? A. Unloads the coal out of the barges.

Q. Where does it take it up? [22] A. Up to No. 1 bin and up to the ovens.

Q. Would you describe to the Court how it conveys the coal once it gets up how high up does it go and how is it passed around? A. I guess the elevator is about—I know it's 39 buckets on a line.

Q. Well, does it—When it gets raised, does it go on conveyor belts? A. It goes up and unloads into a shoot and goes up the belts and through other bins which puts

it into the crusher and it goes out of the crusher then up to the other bins up to the mix and then on up to the oven bins.

Q. How many men work above on these conveyors and bins and so forth? Do you have any idea? A. I really have no idea.

Q. There's more than three? A. Yes, lot more.

Q. About how many? A. I'd say about 25 or 30.

Mr. Libenson: If your Honor, please, I might have to run—

The Court: Would you rather wait until 1:30 or what?

Mr. Libenson: Whatever the Court wants. I can be back here I think at about a quarter of 12. It's up to—

[23] The Court: Is that all right with you, Mr. Murdoch?

Mr. Murdoch: I have no problem. I know of some problems you can run into.

The Court: Let's do it this way. If you're having troubles, you're going back to your office—

This is off the record.

(There was an off the record discussion.)

The Court: We'll recess until 1:30.

(Court was thereupon recessed at 11:00 a.m. After the lunch recess, the following proceedings were held commencing at 1:40 p.m.)

The Court: Good afternoon.

(Witness resumed the stand.)

By Mr. Libenson:

Q. Mr. Pfeifer, I think when we broke this morning, I think you were describing the coal elevators and what they did. Would you just refresh us on that? A. Yes, sir. A coal elevator has continuous buckets which run two lines some which dips down into the coal on the barges and puts it up on the belt to take it to the bins and through the bins into the crusher and on up into the mix to be distributed out to the ovens.

Q. And this extends from the water line how far do [24] these conveyor belts go? A. I don't know just how far. They're quite a bunch of long belts.

Q. Where are these bins located where they store the coal? A. The first bin is right up on the bank above the elevator and then they have other bins on up at the mix which is four or five belts up and they run through the crusher before it gets to the mix and P-1 and P-4 are both big bins.

Q. About how many people are employed in observing or watching or making sure the coal gets to the proper bin? A. I'd say about 25.

Q. They work when the elevator is moving, is that right? A. Yes, sir.

Q. What happens when the elevator shuts down? A. Then they're down.

Q. So what is the No. 1 object of the unloading of the coal barges? A. Not to hold up the elevator.

Q. And when you come to work on a turn, what is the first thing that you people have to do? A. Contact the foreman to find out what barges to put in what order and have them down at the elevator for unloading.

Q. How long does it take a barge to be unloaded, a [25] fully loaded barge? A. Approximately an hour.

Q. How long does it take to move a barge, move it out away from the elevator and move a new one in? A. About 15 minutes.

Q. And that's when you use a tugboat, is that right? A. Tugboat.

Q. What day were you injured? A. Friday the 13th.

Q. And what month and year was that? A. January the 13th, 1978.

Q. About what time of the day were you injured? A. Around 4 a.m.

Q. And you had started at what time? A. 12 o'clock midnight.

Q. Would you tell the Court what the weather conditions were? A. Snowing, freezing. It was more of a blizzard affair.

Q. How high was the accumulation of snow? A. I'd say two to three inches.

Q. And this accumulates on all the barges, doesn't it? A. Yes, sir.

Q. Were you busy that night? A. Very busy. We had been out from—

[26] Q. Would you describe what you mean by busy as compared to not too busy? A. We had barges to pull out of the fleet to get to the elevator and we had a couple of barges break loose in the fleet that we had to—

Q. When did that occur? A. Right before we started on this pump we were trying to get them secured again.

Q. Get what? A. The barges secured again, get them pushed back in.

Q. Would you describe what broke loose and what happened and how you took care of it? A. We were pulling the barge out of the third coupling on the outside and the two lower barges in the first and the second

coupling the line broke on it and that caused the barge to go out, start flopping around in the river and the boat that we had couldn't handle it and we brought the Nancy Jane from the lower landing to come up and give them a hand.

Q. How much time did that take? A. It took the Nancy Jane a few minutes to get there and I'd say approximately 10 minutes to get them back in, pushed back in the fleet.

Q. After you got it in the fleet, what did you have to do? [27] A. Retie it and I had to get a new lead wire for the pump and we had a pump and a—

Q. How many couplings did you have in the fleet that night? A. Five.

Q. How many barges in a coupling? A. It can be anywheres, nine barges in a coupling. I think we had around seven or eight in a coupling that night.

Mr. Murdoch: I'm sorry. I can't hear.

By Mr. Libenson:

Q. Speak up. A. I said around around seven or eight in a coupling.

Q. If you had five couplings, you would have anywhere from 35 to 40 barges? A. Approximately, yes.

Q. What condition are these barges in relative to being loaded or unloaded how? How were they? A. The ones that are in the fleet are mostly always loaded. The part loads we tried to keep on the lower end of the fleet.

Q. When you said loaded, that's loaded with coal, is that right? A. Yes, sir.

Q. When they're loaded, does the coal extend above the gunnels? [28] A. Yes, sir, the coal heaps into the middle.

Q. How high above the gunnels would you say the coal is? A. Three, four feet.

Q. Do you know how many tons of coal are in the average barge? A. Around 900. I think they estimate 900, 20 ton in a 175 and about a thousand ton in a 200.

Q. Are most of these barges one size? A. You get both of them variation of 175 and 200 footers.

Q. These barges in addition to holding the coal they have bulkheads, don't they? A. Yes, sir.

Q. Would you describe to the Court what the bulkhead is? A. The bulkhead is the wide end of the barge and it's made for the taper of the barge for pushing it up and down the river. It's the rake end of it which has a hole down inside which if it gets water in, you've got to keep it pumped out.

Q. The bulkhead is not filled with coal, is that right? A. No, sir.

Q. Is that on both ends of the barge? A. Yes, sir.

Q. The bow and the stern.

[29] Do these barges spring leaks? A. Yes, sir.

Q. What provisions did your employer, Jones and Laughlin, make for taking care of leaks? A. You had to plug them or best way a board, put a block up again them.

Q. That's when they're empty? A. No, even when they're loaded with keel to keep the water from coming in so fast.

Q. Did you also have pumps? A. At that time we had three pumps available.

Q. Would you describe the construction or the composition of these pumps and how they functioned? A. The leg is about eight foot long and it inserts down into

the gunnel hole or into the bulkhead of the barge then you have—

Q. The leg is a hollow tube? A. It's a tube with a shaft runs down through the middle to run a propeller to bring the water up out.

Q. How much does it weigh? A. Approximately 80 to a hundred pound.

Q. And this is the part that's inserted in the water, is that right? A. Into the barge.

Q. What other parts were necessary to make this pump [30] function? A. You had to have the head which was electric motor.

Q. How much did that weigh? A. About 80 pounds.

Q. And what else? A. You had a breaker box and you have to have your lead wire that runs from your cribbing out to connect up to.

Q. So in moving a pump from one barge to another, how many people did it take to do it? A. We all three usually was out there to move them.

Q. How many pumps were available while you were working at No. 1 landing which had these five couplings the night you were injured? A. Three.

Q. Prior to that, did you have more pumps? A. Yes. We had to—Usually five to seven pumps all the time.

Q. Do you know where the other pumps were that night? A. They changed over and went to a new style and we couldn't use the old ones no longer.

Q. When did they change—When had they changed over? A. Just a few days or so before that, maybe a week before that, just a short while.

Q. Would you describe to the Court what the previous [31] pump system was like and how it compared to the system that they had when you were injured?

Mr. Murdoch: Objection, Your Honor. I don't think that's relevant to what he's doing at the time of his injury.

The Court: Is this new system subsequent to the time he was injured?

Mr. Libenson: No. At the time. There was a prior system before he was injured which they had changed and I want him to—

The Court: He was using the new system at the time he was injured?

Mr. Libenson: That's correct.

The Court: Okay. I think that's admissible.

By Mr. Libenson:

Q. Do you understand my question? A. Yes. The old pumps you could run one lead wire and have one leg in one head and run a "Y" between them and run two pumps off of one lead wire. The new system you could only run one through pump off of one breaker box off of one lead wire.

Q. Did this result in more or less manpower and time to get the same result? A. It took more time to get the same results.

Q. When you went onto that shift, the 12 to 8 on January 13, 1980 and after you observed the weather conditions, [32] did you make a telephone call to your foreman?

Mr. Murdoch: Objection, Your Honor, as leading.

The Court: We'll sustain the objection.

By Mr. Libenson:

Q. What did you do relative to the weather conditions on January 13th, 1980 after you came to work? A. I had asked the foreman that night if he could get us more help down there.

Q. Who was the foreman? A. Sherman Haddix.

Q. At what time did you ask him that? A. Between midnight and about five after.

Q. You had worked on this for J & L for 19 years, is that right? What was your experience when there was snow and ice and bad weather on previous occasions in regard to the amount of people they had? A. They would often double a man out or have somebody extra to salt and stuff like that. There was no one.

Q. You say you called Mr. Haddix and asked him for extra help. What was the response you got? A. He told me he had no one.

Q. Did he say he would get anyone? A. He didn't say if he'd get anyone or not but he never did.

Q. On prior occasions when there was snow and ice, [33] had the employer sent additional help?

Mr. Murdoch: Objection, Your Honor. I don't think the fact that there's snow and ice—I think we have to talk about accumulations. I don't think that's relevant to this particular action.

The Court: We'll let the witness answer.

A. They had different men to come down and help shovel and help salt on occasion when they had barges to move.

Q. On January 13th, 1978, the night you were injured, did you or the two people that were working with

you do any shoveling of snow or ice off the gunnels? A. We didn't have no time to shovel off snow or ice.

Q. Did you put salt on that night? A. There was no salt available.

Q. Did you have time to put on salt? A. No, sir.

Q. When you say there was no salt available, will you tell the Court what the usual procedure was relative to having salt as you say available? A. Daylight usually kept the salt down on the front of the pump boat in buckets or bags which ever way it was shipped in and it was right there at the pump boat.

Q. Where is the pump boat? A. The pump boat was sitting right off from the cribbing in between the second and third coupling.

[34] Q. Is that what—Would you describe what the pump boat is? A. Pump boat is a building where we had the telephone and all that in and we had a wench on the front of it and all that. It was a stationary building there.

Q. Was it built on a barge? A. It was on a small barge that floated.

Q. Was this sort of the office for the No. 1 landing? A. It was the office for the landing.

Q. Was this where the men changed? A. At that time, yes.

Q. Is this where you wrote up your reports? A. Yes, sir.

Q. And this is where the telephone was? A. Telephone.

Q. Where did the foreman stay? A. Up on the bank.

Q. So once you started working, the pump boat was empty, is that right? A. If we were out on a fleet, yes.

Q. If you were not on a fleet, you stayed into the pump— A. We could get into the pump boat, yes.

Q. Whose responsibility was it to bring salt to the pump boat? [35] A. The day—They had daylight laborers to bring the salt down.

Q. On January 13th, 1978, was there any salt there? A. None.

Q. What happened—Would you describe to the Court the situation as you recall it leading up to your injury? A. We was out on the fleet all night and we had went down to change a barge and we noticed this 1384 was getting low in the water so we went up and got a pump, a leg, in other words, out of one barge and one man went to get a lead wire and I went to get the head and the breaker box to take them all down to put in this. There was one pump on a gunnel pumping.

Q. Was it already functioning? A. The one on the gunnel was already functioning.

Q. How high do the loaded barges ordinarily ride out of the water? A. 15, 18 inches.

The Court: Excuse me. You mean on the barge that was sinking there was already a pump working on the gunnel?

The Witness: On the gunnel, yes, sir, in the body.

By Mr. Libenson:

Q. Where was this barge located relative to the—What part of the barge was that located in? A. It was the upriver end.

[36] Q. That was in the— A. First coupling.

Q. But it was in the part of the barge that was holding the coal as compared to the bulkhead? A. No.

The water was in the bulkhead and in the body alongside.

Q. Excuse me. I'm talking about the first pump. A. It was alongside where you walk on the gunnel there's holes there and it's down in the first hole off next to the quarterhead.

Q. Is the leg of the pump put in the open part of the barge there? A. Into the separation between where the coal is kept and the outside of the barge, there's metal on each side and it goes right down in between.

Q. It's like a panel or something, a metal panel? A. Yes. It goes down and across the bottom.

Q. In other words, the coal doesn't go flush up the side of the barge? A. No, sir.

Q. I didn't understand that. And the pump you say was it amidships or what location on the barge was it? A. It was by the upriver quarterhead.

Q. And the second pump that you wanted to put into this same barge where were you going to locate that? [37] A. Into the bulkhead itself.

Q. Also upriver? A. On the upriver end.

Q. Both on the same end of the barge? A. Yes, sir.

Q. One is in the bulkhead and one is in the— A. The gunnel.

Q. Where was the barge—Where was the pump that you had to get to put into this sinking barge? A. The leg was up in the third or fourth coupling. I didn't get—Walter or one of them got the leg and brought it down. I went to get a motor and a breaker box and the other man, Harvey that was helping me, went to get the lead wire to get power down there to run the pump.

Q. Well, was this pump altogether in another barge and have to be disassembled and taken to the bulkhead at 1384? A. Just the leg was in that barge.

Q. Where was the— A. The head was over at the pump boat.

Q. So the leg of that pump was not being used in an active manner when Walter went to get it, is that right? A. No, sir.

Q. Was that barge that they took it out of up out of the water? A. It was pumped out already.

[38] Q. How far away was that barge from 1384 where you had to take the motor? A. About three couplings.

Q. And how do you get there? A. You walk the gunnels of the barges and across the bulkheads to get to them.

Q. You say Walter and Harvey Hicks were already there when you got injured? A. Yes, sir.

Q. Would you tell the Court the path you took and where you walked before you became injured? A. I walked out of the pump boat which is between the second and third coupling, I crossed the bulkhead on the upriver end of the barge in the second coupling, went out onto the third coupling out and started down the inside gunnel.

Q. Would you describe to the Court how you carried this equipment? A. I had the breaker box in my right hand and was holding the pump on my shoulder and holding the breaker box at the same time and was walking down the gunnel. (Demonstrating)

Q. Did you have these two pieces of equipment in both hands? A. Yes.

Q. You had no hand free, is that correct? A. No, sir.

[39] Q. How much did the motor weigh? A. Approximately 80 pounds.

Q. How much did the breaker box weigh? A. Maybe five, ten.

Mr. Murdoch: I'm sorry. I didn't hear the last response.

Mr. Libenson: 15.

The Witness: It was either five or ten pounds.

By Mr Libenson:

Q. How many feet had you covered from the time you picked up the breaker box and the motor to the time you fell? A. Approximately 205, something like that.

The Court: Excuse me. 200 feet?

The Witness: 205 feet.

By Mr. Libenson:

Q. The barge that you fell on do you know the number of that barge? A. 1011.

Q. What size barge was it? A. That's a 200 footer.

Q. And at what point did you fall? A. I was already on the downriver end past the lower quarterhead.

Q. How far had you walked on that day? A. On that particular barge over 175 feet because the [40] quarterhead is 25 feet off.

Q. Were you hurrying? A. In a sort I was hurrying because we wanted to try to save that barge.

Q. Was this an emergency? A. Yes, sir.

Q. Why was it an emergency? A. When it gets down to two or three inches clearing of the water, I feel it's a definite emergency.

Q. Will you describe where you fell and how you fell? A. I just passed the quarterhead and was walking on down towards the end of 1011 towards the bulkhead and I had the motor and the breaker box, the motor on my shoulder and the breaker box in my hand and the—my other hand steady and the motor too and I was past it and I was going down the gunnel, both feet went out

from under me, I turned a little bit and I struck my back and my buttocks on the rail and I no more hit it than the motor came off my shoulder and landed on my lap.

Q. What happened to any of your clothing? A. My hat flew off.

Q. What kind of hat had you had on? A. Hardhat.

Q. Where did that fall? A. Went down on ahead on the gunnel.

Q. How wide are these gunnels? [41] A. 16, 18 inches.

Q. You said you fell on a rail. Would you describe the rail to the Court? A. The rail is a piece of steel that stands up along the inner edge of the gunnel about 2 1/2 inches and it's about a quarter of an inch thick on some and some of them has got the old mine rail on it yet, they're a little wider but they stand up about the same height.

Q. What's the purpose of having those rails on there? A. That's safety precaution I guess to keep you from slipping more on the inside.

The Court: Did you say the rail is only two inches off the gunnel too?

The Witness: 2 to 2 1/2 inches high.

By Mr. Libenson:

Q. It's got a handrail, is it? A. No, no, no.

Q. You say that you fell on your backside and did you feel any pain at that time? A. Yes, I felt quite a bit of pain in my buttocks and my tailbone, my lower back then when I went to move, I felt it come clear up into my neck.

Q. Then what happened? A. I rolled the motor off my legs onto the gunnel, laid the breaker box down. It took me awhile before I was [42] able to manage to get back

up to my feet. I got up, picked the motor up and the breaker box and continued on down the barge and across the bulkhead and handed the motor to one of the other fellows and they took it on down and I went down to help them. I crawled down off of that barge onto the other one and went down to help them—I held the light for them while they got it hooked up and got it pumping.

Q. What kind of light did you hold? A. Flashlight.

Q. Is the light from the wall or the—I guess there's lights on the wall, is that right? A. On the cribbing.

Q. Yes. Is that enough light to do this without a flashlight? A. No. You've got—When you hook up a pump to a motor, you've got two pins you've got to set them down on and there's not enough light to see because it sits back in the bracket and you've got to see back in there with a flashlight to line them two pins up to set on.

Q. Could any of the other two men that were working with you have carried either the—of the other pieces of equipment at that time?

Mr. Murdoch: Objection, Your Honor. It calls for a conclusion.

The Court: Will you read the last question? [43] Would you read the question, please?

(The question was read by the reporter.)

The Court: We'll sustain the objection.

By Mr. Libenson:

Q. Why didn't the other men carry the equipment you were carrying? A. One of them had the leg of the pump in the barge. The other man was carrying the cable and stringing it out to get the power to hook the pump up when we got it all together.

Q. How many men does it take to assemble or make operational the type of pump you were using that night? A. Usually three men have us to get it.

Q. This barge that you were injured on now I think you've called it 1011, do you know how long it had been there in the fleet? A. It had been there for quite awhile.

Q. What do you mean by quite awhile? A. Possibly a week, maybe even two weeks.

Q. Was there any indication that any of the snow or ice had been shoveled off of that? A. It hadn't been nothing shoveled.

Mr. Murdoch: Objection. It's calling for a conclusion if it's two weeks. There's no way you can talk about what happened two weeks ago.

Mr. Libenson: I mean at the time he was injured.

[44] The Court: You can lay proper groundwork. I think it's premature to ask that particular question.

Mr. Libenson: Pardon?

The Court: It's premature to ask that particular question. You can lay groundwork for it.

By Mr. Libenson:

Q. After you fell, did you look around at the barge? A. Yes.

Q. At the gunnel. Was there any indication to you that any of the—that the snow had been shoveled off of that gunnel? A. No, it hadn't been shoveled off.

Q. Was there any indication to you either from what you saw or what you felt when you were walking that there had been any salt put on that gunnel?

Mr. Murdoch: Objection, Your Honor. I don't think he can come to that conclusion.

The Court: We'll permit the witness to answer.

A. There was no salt on it.

Q. When there's heavy snow and sleet on previous occasions, how many—Did they have extra men come out to shovel or to salt?

Mr. Murdoch: Objection, Your Honor. There's been no testimony there was sleet this night.

The Court: Sustain the objection.

[45] Mr. Libenson: Pardon?

The Court: We'll sustain the objection.

By Mr. Libenson:

Q. Was there in addition to snow, what other kind of weather did you have that night? A. It was cold that night and freezing a little bit too.

Q. Had it been raining at all? A. It rained earlier in the evening.

Q. On previous occasions when you had weather of this type, had your employer supplied additional help to shovel the snow off the barge of the gunnels of the barges or put salt on them? A. Yes, on quite a lot of occasions.

Q. How many extra men would they supply on previous occasions? A. One or two, depending.

Q. On January 13th, 1978, were any extra men provided? A. No, sir.

Q. Up to the time you were injured, which I think you testified to was approximately 4 a.m., had you or any members of your shift, that is Mr. Tadder or Mr. Hicks, had any time to do any snow shoveling or salting? A. No, sir.

Q. Would you describe to the Court what a duck pond [46] is? A. A duck pond is a 25 foot length of water between two barges.

Q. And on the night in question, January 13th, 1978, was there a duck pond present in the fleet? A. Yes, sir. There was a duck pond on the end of the 1384 that was sinking on the upriver end.

The Court: I'm not sure I understood what you just said. 25 foot spans of water?

The Witness: It's a 25 foot span of water between the two barges.

The Court: Why is it 25 feet?

The Witness: You have 175 foot barges and you have 200 foot barges and if you have 175 tied alongside of a 200, you have a 25 foot open spot of water.

The Court: And are they required to do it that way? They always tie a 175 foot beside a 200 foot one?

The Witness: Not always. You've got to keep your lower end square as much as possible, the lower end of your fleet all even and if you've got a 25 foot short barge in there, it leaves that duck pond in there to square across the bottom.

The Court: When you say across the bottom, are you talking about downstream?

The Witness: Downriver end.

[47] By Mr. Libenson:

Q. Based on your observation of the work record which showed the elevator was down for some period of time on the 4 to 12 shift and that the pump that you

took off the barge to move to the 1384 barge was not in operation, do you have an opinion based on your experience of 18 years as a barge man and a landing helper and headman as to what should have been done by the earlier crew?

Mr. Murdoch: Objection, Your Honor. First of all, I don't think this man has been listed as an expert. I think I would be entitled to know he's going to give an opinion. Secondly, it's supposition that he's looking at work records. I think they should produce the work records to show that the elevator was in fact down and I think we're talking about two points of supposition that there was no activity on 4 to 12 shift that this man was not present at nor would he have any way of knowing what actually transpired there nor can he testify as to how long the pump leg was on the other barge and I think even if he's entitled to give an opinion, it's entirely irrelevant to the case we're faced with here.

The Court: Do you want to respond?

Mr. Libenson: Absolutely. No. 1, it's their company and the work records are more available to them than to us. No. 2, this man has worked there for 18 years and he can talk about what the custom and usage is and what should [48] have been done by competent people and I think the company is required to provide a reasonably safe place to work and this gets to the point that had the earlier shift moved this pump to the barge that was rather obviously sinking and had been sinking before he got there that he wouldn't have

had to hustle in an emergency situation and wouldn't have experienced this fall.

The Court: We'll rule that the witness can testify as to what he read on the records without producing records since they are available to the defendant. We will also permit him to state what should be done based on his experience since he is a party to the case even though he wasn't listed as an expert.

A. The records showed that according to them that the 4 to 12 shift the elevator had been down for awhile so they should have had the pump in that barge prior to even the start of our shift it should have been in there instead of sitting idle.

Q. Why do you say that? A. Because the barge was—the pump was sitting idle and the other barge needed a pump if it wasn't gaining, it needs a pump badly.

Mr. Libenson: Off the record.

(There was an off the record discussion.)

The Court: We'll hear from the doctor first and [49] then we'll cross examine.

(Court was thereupon recessed at 2:20 p.m.)

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[94] **Transcript of Proceedings, October 29, 1980**

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REDIRECT EXAMINATION

By Mr. Libenson:

Q. Is it your opinion that 95% of the people who have degenerative conditions do not experience pain absent trauma based on this study? A. Can you restate that?

Q. Do you want me to repeat it? [95] A. Yes.

Q. Is it your testimony that 90% of the people who were involved in this study had the degenerative arthritis condition of the neck but did not experience any pain because they didn't have trauma? A. That is correct. I have to specify a little bit. In females is more pain spontaneously than males. That's hormonal. In male patients, it is correct what you state 95%.

Q. And the 5% who experience pain without trauma are also males? A. Spontaneous pain, yes, about 5% will have spontaneous pain.

Q. But the testimony is that 95% of the people who have this condition do not experience pain absent trauma, is that right? A. That is right.

The Court: Thank you, Doctor.

Let's take a 10 minute recess at this time. We'll reconvene about twenty of twelve.

(Court was thereupon recessed at 11:25 a.m. After the recess, the following proceedings were held commencing at 11:40 a.m.)

Mr. Libenson: If it please the Court, I think [96] when we left off yesterday I had said that Mr. Pfeifer would be cross examined. I'd like to have an understanding or ask the Court do you

want me to put in the damage testimony too because I did not do that.

The Court: I would say so but—

Mr. Libenson: I'd like to continue and do that before we cross.

The Court: As a matter of fact, I was wondering why you hadn't.

Mr. Libenson: I wasn't sure whether you wanted to split it up.

The Court: No. That's all right.

Mr. Libenson: Before he resumes the stand, Your Honor, I think there are a good number of exhibits that go to damages that we—I would like to enter into evidence which I received from the defendant either by way of answers to interrogatories or motion for production or following your order after the pretrial and I would read them off and ask whether or not Mr. Murdock would agree to have them go in by agreement. Maybe we should have done this while we were out.

The Court: That's all right. Can we stipulate that these are stipulated too?

Mr. Murdoch: yes, sir.

The Court: Then if you'd just give me a number—We stopped with 4 yesterday so if you could just give me a [97] number so the clerk and I can write them down on our score sheets—

Mr. Libenson: Maybe if the Court would want this fancy thing I've worked out—

The Court: That will be fine then I won't even—Is that consistent with what we were marking yesterday?

Mr. Libenson: No. I pulled one out and marked it as the first exhibit because I didn't know when we were going to do it this way.

The Court: You mean your have something in there that's marked No. 1?

Mr. Libenson: Yes. No. 8 on this list is No. 1, Your Honor, but let me—It would be just as easy if I pulled them out.

Let me show them to Your Honor if I may approach the bench.

(There was an off the record discussion at side bar.)

Mr. Libenson: At this point, Your Honor, we are offering in evidence the following exhibits with a schedule attached which has been identified as follows: 1.1 is the employment records of Howard Pfeifer from Jones and Laughlin Steel Corporation. 2.1 is the employer's records of wage and tax statements of 1977 to 1980 and these are the records of Mr. Vodzak, V-o-d-z-a-k. These are his W-2s and he is the [98] person next higher in seniority to Mr. Pfeifer and we have his W-2s for 1977, '78 and '79 together with his wage statement in 1980 for the pay period May 10, 1980 and if the Court would—

The Court: And that's all 2.1?

Mr. Libenson: That's right and if the Court would refer to my pretrial statement, I use that in the calculation of lost earnings.

3.1 is Mr. Pfeifer's 1977 tax return. 4.1 is the 1978 tax return of Mr. Pfeifer. 5 is the tax return of Mr. Pfeifer of 1979. 6 is the standard hourly

wage job information listed gross earnings for 1977—1975 thru '79.

The Court: '75 thru '79?

Mr. Libenson: Just a moment. That's No. 6.

The Court: No. 6?

Mr. Libenson: It's the—Five is '79 tax return.

The Court: Right.

Mr. Libenson: Six is a summary of his gross earnings for the years '75, '76, '77, '78 and '79 together with—I think this might be out of place. I think we have an error on my schedule.

The Court: Why don't you check it over the lunch hour and do it after lunch?

Mr. Libenson: I'm sorry. I think my summary on the front is not correct and I don't want to put it in.

[99] The Court: Why don't you hang onto those and go over them over the lunch hour and make sure you have what you want.

Mr. Libenson: I'm okay up to six but just let me look at seven. She just had one sheet that I can pull out. I think I can continue.

Mr. Murdoch: May I inquire just as to No. 6 from what the summary was made?

Mr. Libenson: From his tax returns and W-2s.

Mr. Murdoch: What about the payroll records I gave you?

Mr. Libenson: They were from the payroll records you gave me.

I think I can continue, Your Honor, and I'll just pull out the one—No. 7 is the wage scale from the union contract with the appendix from July 31, '77 thru August of '79 together with an incentive

scale and in addition, the new contract wage rates from May, '80 thru May 1, '82 and I might—

The Court: Excuse me. 5/1/80 thru—

Mr. Libenson: Thru '81, '82 and then it also shows supplements for cost of living and adjustments at the bottom of the same item and I think we could agree that his constant class was Class 7 and the testimony either has been stated or will develop that in this particular—working in this area [100] there were variations when different jobs had to be performed. Higher classes were paid and that's the reason we can't just compute a growth across the board.

Mr. Murdoch: Excuse me, Your Honor. Regarding No. 7, I can stipulate that Mr. Pfeifer is normally a Class 7 job. I would like to at least place an objection at this point on 7 only because Mr. Libenson and myself had a previous trial concerning this and I think the gentleman from the payroll department from Jones and Laughlin did not exactly agree with the figures that were put in under the last contract. I don't necessarily or know that he will differ but I'd just like to have him look at these since I don't have them. He'll be here to testify tomorrow.

Mr. Libenson: Very well.

The Court: I'll reserve ruling on it. That's No. 7?

Mr. Murdoch: Yes, sir.

The Court: Let me ask if you can stipulate to it because I don't want to make the lawyers testify but if my notes are correct, there's a gap

in the wage scale between August '79 and May '80. Was there a strike then or something?

Mr. Libenson: Maybe I didn't read—

The Court: I thought you said July '77 to August '79 and then a new scale from May '80 to August '82.

Mr. Murdoch: The contracts run from August so—

[101] Mr. Libenson: I think the '79 contract was—

The Court: Extended while they were negotiating or something?

Mr. Libenson: The new contract after '79 was—I see what you're talking about 8/1/81 but they had on this sheet that they must have had a retroactive deal there or something because the 5/1/80—

The Court: Take a look at that at the lunch hour and see if you can figure that out.

Mr. Libenson: The next one which we will skip nine I'll take that out and No. 10 is a letter from Mr. Murdoch to a William Eisman from Hartford Insurance Company dated 8/4/1980 regarding the gross earnings of a person next lowest in senority to Mr. Pfeifer. These were the calculations I used in my supplemental pretrial statement.

The Court: All right. Exhibits 1.1, 2.1, 3.1, 4.1, 5, 6 and 10 are admitted. We'll reserve ruling on 7 until the company man has a chance to check it out.

You may take the stand again, Mr. Pfeifer. You're still under oath.

(Witness resumed the stand.)

Mr. Libenson: Also I think, Your Honor, that Mr. Murdoch and I since we stopped yesterday have agreed that Mr. Pfeifer is a longshoreman.

Mr. Murdoch: Yes.

[102] Mr. Libenson: Would you agree to have me read in Paragraph 5 from my Complaint?

Mr. Murdoch: No. I still have the same objection, Your Honor, that even though—I'd like to put on the record—even though Mr. Pfeifer is a longshoreman, I still would be raising legally our position under Section 905(b) which is no jurisdiction as a longshoreman to be in court today.

The Court: You're raising the question about the employer already paying and this being brought as an interim action against the barges?

Mr. Murdoch: Yes. Actually two different bases. We're still making the compensation payments. I think Section 905(a) says as long as payments are being made, that's an exclusive remedy.

Secondly, you have already ruled against me on a motion for summary judgment so I'll be renewing this so I cannot agree that this is jurisdiction.

Mr. Libenson: We don't have to prove that.

The Court: I rule that we do have jurisdiction. I think I made that in ruling on the motion for summary judgment.

By Mr. Libenson:

Q. Howard, just a few questions. What are the dimensions of this motor you were carrying? A. Approximately 18 inches long and 12 inches across.

[103] Q. And you have already—How much did it weigh again? A. Approximately 80 pounds.

Mr. Murdoch: I'm sorry, Mr. Pfeifer, did you say 80?

The Court: Do you want to pull that microphone toward you?

(Witness did so.)

By Mr. Libenson:

Q. When you were taking this motor to form it into the pump, on what barge number was that again? A. On 1384.

Q. Was there any other route that you could have taken to have gotten to this sinking barge? A. No. That was the most direct route and most available route.

Q. Pardon? A. Most available and most direct route.

Q. Were you walking carefully at the time? A. Yes, sir.

Mr. Murdoch: Objection, Your Honor. I think that calls for a conclusion. That's why we're here.

The Court: Well, I think the witness can give his own opinion as to the manner in which he was walking. We'll overrule it.

[104] A. Yes, sir, I was walking carefully.

Q. Was there anything you could have done to avoid slipping at the time you fell? A. No, sir.

Q. Was the 1384 barge seaworthy?

Mr. Murdoch: Objection, Your Honor. That calls for a conclusion and secondly, seaworthiness is not under the Longshoremen's and Harbor-workers Act.

The Court: We'll sustain the objection.

By Mr. Libenson:

Q. Could the 1384 barge stay afloat? A. No, sir.

Mr. Murdoch: Objection, Your Honor. Calls for a conclusion.

The Court: I think the witness based on his experience can answer that one.

A. No, sir, I don't feel it could have.

Q. What class job did you have as a regular employee? A. 7.

Q. And were there occasions when you worked in different classes? A. Yes, sir. Vacations or someone off you'd move up to a headman.

Q. What did the headman get paid? A. 13.

[105] Q. The night you were injured, what were you doing? A. I was—

The Court: I didn't hear your answer?

A. 13 points.

The Court: Does that mean a Class 13 job or what?

The Witness: Yes. It pays 13 points.

The Court: See, I'm not that familiar in the manner in which you described it. You were a Class 7?

The Witness: Yes, sir.

The Court: Are you still a Class 7 when you're a headman?

The Witness: No. You're a Class 13 then.

The Court: All right.

By Mr. Libenson:

Q. Were there any other classes in between 7 and 13 that were available to people working in the Coal Handling Division? A. No, sir.

Q. Did you ever work as a 9? A. No.

Q. What does the elevator man get? A. Same as the landingman.

Q. What's that? A. 13.

Q. Are there people that work on the river that work [106] less than a Class 7? A. Yes, sir.

Q. What are they? A. Class 5.

Q. Would that be the helpers? A. That's the barge helpers.

Q. All these rates are laid out in the union contract, is that right? A. Yes, sir.

Q. Since the accident, would you tell the Court about your medical condition, who you saw and what your complaints are and limitations? A. You mean for medical doctors?

Q. Yes. A. I saw Dr. ElAttar and Dr. Sherman and I saw the doctor at South Side Hospital. His name I did not hear.

Q. Immediately after you were injured, did you tell your foreman about your injury? A. I called him and reported it. I didn't get to see him when I was delivering the mail but I called him right after that.

Q. And then what did you do? A. I changed clothes and I got dressed and went to the dispensary.

Q. Where was the dispensary? [107] A. In Hazelwood.

Q. What time of day or night was that? A. It was right around 8 o'clock.

The Court: That would have been eight in the morning?

The Witness: 8 a.m.

By Mr. Libenson:

Q. Had you done any work after you saw this pump was hooked up? A. No, sir.

Q. Where did you go? A. Up the pump and made out my reports and delivered them.

Q. Who did you deliver them to? A. To the lower landing and to the office.

Q. Were you in pain at that point? A. Yes, sir, I was, very much.

Q. What parts of your body were bothering you? A. My back and my neck were bothering me terrifically.

Q. Did you have any bruises that showed? A. Not that I know of.

Q. You couldn't see them? A. No.

Q. How did you get to the dispensary? How far was it from the landing? A. I went down and my car was parked at the lower gate [108] and I went out to it and got in my car and took it up as far as the dispensary that I went in there and the nurse there called a jitney.

Q. A jitney? A. To take me to the South Side.

Q. What's there? A. The South Side Dispensary.

Q. Who did you see there? A. Dr. ElAttar.

Q. What did he do? A. Took X-rays and gave me medication and after he done that, he sent me back over to Hazelwood to get—and I got my car and the man from the dispensary followed me clear down to Second Avenue to see if I could handle the car even to get home with it.

Q. Were you able to get home? A. Yes, I made it home.

Q. What did you then? A. I went to bed.

Q. What did you do the following day? A. I couldn't get out of bed the following day.

Q. Why not? A. My back was aching so bad and my neck and that I just couldn't get navigating.

Q. How long did you stay home? [109] A. It was a couple days until I got—And I had to come back into the dispensary and I had my fiancee and daughter-in-law driving for me then back and forth.

Q. You couldn't drive at that time? A. It was too painful at this time.

Q. Who did you see at the dispensary? A. Dr. ElAttar was the main one that I saw.

Q. What did he do? A. He gave me more medication.

Q. Do you know what the medication was? A. No, sir, I don't know what he gave me then.

Q. What did you do after you saw him? A. Went back home then awhile later he told me, he said to be at South Side Hospital on a certain date and I made it down. I went down there to South Side and they took some kind of tests and treatments down there, testing and that and then I reported back to Dr. ElAttar because he got the reports back from it.

The Court: Excuse me. I got mixed up on the time sequence here. This accident happened on Friday the 13th, right?

The Witness: Yes, sir.

By Mr. Libenson:

Q. After midnight, in other words, and then you went to the dispensary at 8 o'clock, that would have been 8 o'clock [110] Friday morning the 13th, right? A. Yes, sir, Friday the 13th.

The Court: Then the dispensary there sent you over to see Doctor—You were on the north side of the river at that point in Hazelwood?

The Witness: Yes, sir.

The Court: And then the doctor sent you over to the South Side to where the big dispensary is to see Dr. ElAttar?

The Witness: The nurse is the one that sent me over.

The Court: Then you went home to bed and you stayed in bed a couple of days. Would that have been Saturday and Sunday?

The Witness: Yes, sir.

The Court: And then when did you see Dr. ElAttar again, on Monday?

The Witness: I saw him Monday.

The Court: Is that when you went to South Side Hospital?

The Witness: No, sir. He gave me more money and that and I had—They gave me a few heat treatments over there and told me to come back in a few days. He told me—Just what day it was a matter of three or four days and I went back to him and then he told me to be at South Side.

[111] By Mr. Libenson:

Q. Who saw you at South Side? A. Head therapist. I don't know what his name was.

Q. What was done for you? A. He gave me some shock tests or treatment to that.

Q. Did you then have to report back to Dr. ElAttar? A. Yes, sir.

Q. Same day? A. No, sir. He told me he'd send the reports back to Dr. ElAttar and Dr. ElAttar told me to come back to him.

Q. What medication had Dr. ElAttar given you to take at home? A. They were tablets but I don't know what the name of them were. They were pain pills and tried to get some relief on my back and neck.

Q. Did you have a lot of pain at that time? A. Yes, sir.

Q. Where was the pain? A. Across the bottom of my back, went up my back and came up in my neck, up here across on my shoulder and headaches I still have.

Q. Did you then get in some kind of course of treatment with Dr. ElAttar or what— A. I went to Dr. ElAttar then a few more trips and he recommended me for therapy and he recommended me to Citizens [112] General Hospital in New Kensington because it was my closest hospital.

Q. How often did you go to the physical therapy? A. I started off with three times a week and that continued for quite awhile then he cut it down to once a week then on Dr. ElAttar to discontinue it, that's when it was discontinued.

Q. While you were getting the physical therapy at Citizens General, were you also seeing Dr. ElAttar in Pittsburgh? A. Yes, sir.

Q. How often would you see Dr. ElAttar? A. Sometimes a month, sometimes two weeks. He'd set the dates up accordingly.

Q. In between the times you were getting physical therapy or seeing Dr. ElAttar, were you on medication? A. Yes, sir.

Q. What type of medication? A. Pain pills that they gave me from over at the dispensary.

Q. What did you do during this period of time? A. More or less just relaxed and took it as easy as possible trying to get back into shape to get my pain eased some.

Q. Had you ever had this long a period away from [113] work before? A. No, sir.

Q. Did the physical therapy extend until about April of 1979? A. Yes, sir.

Q. When did you start it, do you remember? A. It was a couple weeks after I got injured.

Q. Would March 17th of 1978 be approximately when you first went? A. That's the first time probably to New Kensington.

Q. Yes. A. I got a few treatments over at South Side before that.

Q. Jones & Laughlin supplied me with a copy of a physical therapy visit and I've told them and according to this, you had 41 visits in 1978 and 17 visits in 1979. Is that approximately correct? A. Yes.

Q. In April of 1979—Strike that.

Did Dr. ElAttar send you to see any other doctors during this period of time between the time you were injured in April 1979? A. Yes, sir. I saw Dr. Palmer and Dr. Hershey up at the Mercy Medical Center.

Q. How many occasions did you see them? [114] A. I'd say approximately five, six times.

Q. Do you know what you saw them for or what did they tell you your condition was? A. They examined my back and that and told me they didn't know what else to do unless it was a myelogram.

Q. Did they tell you what a myelogram was? A. No.

Q. Do you know what it is? A. I heard from Dr. Novak here explain a little about it and that's the only way I knew what it consisted of.

Q. Did you discuss this myelogram with Dr. ElAttar? A. Yes, sir, I brought it up to him and told him that's what they suggested.

Q. What did he say? A. He told me we're going to hold off on it.

Q. Did you also see this Dr. Enriquez at Harmarville? A. That must have been the one at the South Side Hospital I had to see because I was never at Harmarville.

Q. There's a doctor whose name has been mentioned as—

> The Court: When you went for physical therapy then, that was always at New Kensington Citizens Hospital?
>
> The Witness: Citizens General Hospital in New Kensington, yes, sir.

By Mr. Libenson:

Q. Dr. Danielo, D-a-n-i-e-l-o, Enriquez, E-n-r-i-q-u-e-z, his report is on Harmarville letterhead but he sent a carbon [115] copy of South Side Hospital and he said he saw you—He has a report here dated March 8, 1978 addressed to Dr. ElAttar. Do you recall being examined by him? A. That's the one from South Side Hospital.

Q. He did some tests is it you say? A. Yes.

Q. Did he discuss your condition with you? A. No, sir.

Q. In other words, you just showed up for the tests? A. I went there when I was told and they called me in. He told me he was going to run these tests through for

Dr. ElAttar and I told him it was all right with me and he went ahead with them and Dr. ElAttar would get the results.

Q. You never saw him before or after that? A. No, sir.

Q. And was Dr. ElAttar your treating physician and still is? A. Yes, sir, he still is.

Q. After you stopped the physical therapy which would be in April of 1979 about a year and a half ago, what kind of treatment have you been receiving? A. I've been on just medication, that's all, the Ascriptin and he had me on Valium and he took me off of that too.

Q. How often did you see Dr. ElAttar? [116] A. Sometimes three months now, sometimes he even stretches—This time he stretched it out to six months. I go back on March 15th or 16th.

Q. Of March? A. Of March.

Q. Of 1981? A. Yes.

Q. When is the last time you saw him? A. About two months ago.

> The Court: Did you say you now see him every three to six months?
>
> The Witness: Sometimes he gives you an appointment of three months. The next time he may stretch it for six months. This time he stretched it for almost six months because I don't go back until the middle of March.

By Mr. Libenson:

Q. When was your last visit? A. Last month.

Q. When? A. Last month.

Q. In September? A. Yes.

Q. What did he do for you in September when you last saw him? A. Give me more medication.

[117] Q. What is the medication? A. The Ascriptin.

Q. Is that a prescription? A. No. That's just an aspirin with Maalox. It's supposed to help for pain.

Q. Does it help? A. No.

Q. Is there anything else he wants you to do to alleviate— A. He wants me to move as much as I can but when you ache, you're not going to do too much. I take walks to keep from stiffening up.

Q. What are your present physical limitations? A. I can't sit long.

Q. How long can you sit? A. Well, depends if I keep moving around, I might be able to sit for a few hours but I've got to change position because it's like I'm sitting on two balls everytime I sit and my back is aching and my neck starts cramping on me; more pain than cramping and I have had a headache most of the morning even.

Q. Would you describe that headache? Where is this headache? A. It more or less comes in across above your eyes like and it just starts like a little thump.

[118] Q. Would you tell the Court and describe what kind of physical work you can do now if any? A. I ain't doing anything now.

Q. Why is that? A. It hurts me to sit and drive the car for any amount of time or anything else. I can't stay in one position that long.

Q. Before you were injured on January 13th, 1978, did you have any physical limitations? A. No, sir.

Q. Did you work steady? A. Yes.

Q. What kind of work were you able to do? A. I farmed besides working at J & L, I farmed and made hay and took care of cattle and everything.

Q. And worked eight hours at J & L? A. Yes, sir.

Q. Were you able to get around on all these barges? A. Yes, sir.

Q. Carrying a pump before you fell, was that a big problem for you? A. No.

Q. Did Dr. ElAttar tell you that there's any medical treatment for you that's going to make your back into the way you used to be before the injury? [119] A. No, sir. He told me I was going to have to learn to live with it.

Q. Could you go back to your old job? A. No, sir.

Q. Pardon? A. No, sir.

Q. Why not? A. I couldn't begin to stand it. It's too strenuous of a job.

The Court: Excuse me. I couldn't hear the last.

The Witness: It was a strenuous job. It was all hard work.

By Mr. Libenson:

Q. Have you ever done any other kind of work in your lifetime other than laboring type or strenuous type of work? A. No, sir.

Mr. Libenson: You may cross examine.

The Court: This might be a good time to stop for lunch. We'll reconvene at quarter of two.

(Court was thereupon recessed at 12:30 p.m. After the lunch recess, the following proceedings were held commencing at 1:50 p.m.)

The Court: Good afternoon.

Mr. Hopkins has some other things to do so I'm [120] going to excuse him if nobody minds. I'll swear the witness.

Mr. Libenson: He's been previously sworn.

The Court: Yes. We're all right.

(Witness resumed the stand.)

Mr. Libenson: Your Honor, over the lunch hour we did agree on some additional facts. No. 1, one additional fact that the retirement age for people in the plaintiff's capacity was age 65.

Mr. Murdoch: Yes.

Mr. Libenson: And I have an actuarial table using the vital statistics Volume II.

The Court: Excuse me. What year?

Mr. Libenson: That was my question whether the Court has a later one.

The Court: Mine is '76.

Mr. Libenson: I think this is earlier, Your Honor. If you would want to tell us the life expectancy of a white male aged 55 at the present would be on your table.

The Court: At age 55, the life expectancy, and I'm reading from Lawyers and Judges Publishing Company copyright the last year is 1976 on this and it shows white male 19.7 years.

Mr. Libenson: Mine was a '71.

There's a 10th of a year in there.

The Court: I'm glad to know we're making some [121] progress in some fields anyway.

That's a stipulaton?

Mr. Libenson: Yes, Your Honor.

Mr. Murdoch: Yes, Your Honor.

Mr. Libenson: Mr. Murdoch has further stipulated that the J & L plant and the particular job was subject to OSHA and I would offer in evidence at this time, Your Honor, OSHA regula-

tions 1910.616 which refer to longshoring, 1918.37 which refers to barges and 1918 91 referring to housekeeping and the particular projects that I would ask the Court to review are 1918.37(b).

The Court: B as in Baker?

Mr. Libenson: Yes, and I'll read it into the record with the Court's permission.

The Court: Very well.

(Mr. Libenson did so.)

Mr. Libenson: Also on housekeeping 1918.91(c) that's "c" in parentheses. Maybe I'd better read "a" so that it follows.

(Mr. Libenson did so.)

Mr. Libenson: These were copied from a booklet entitled "Longshoring Industry OSHA Safety and Health Standards" 29 CFR 1918 U.S. Department of Labor, Occupation Safety and Health Administration July 1975 and underneath that there's OSHA 2232. I'll put the whole book in if the Court wants.

[122] The Court: Very well.

Mr. Murdoch: Your Honor, at this time regarding that exhibit, I object to it. First of all, I have stipulated that yes, but we are regulated by OSHA.

The Court: Excuse me. The 1918, 1910 and 1918 those were—Is that Exhibit 11?

Mr. Libenson: You can put it in all as one exhibit, yes, Your Honor.

The Court: He's objecting. I don't think he's objecting to 11 but he's objecting to the next one or am I wrong? Are you objecting to all OSHA—

Mr. Murdoch: All OSHA, yes, Your Honor.

Mr. Libenson: Off the record.

(There was an off the record discussion.)

Mr. Libenson: I will ask that this be marked as one exhibit.

The Court: That would be 11.

Mr. Libenson: And offer it in evidence at this time.

The Court: Okay. Do you want to put your objection on the record?

Mr. Murdoch: Yes. I think my objection is twofold. First of all, I think these would be like any other regulations or any other statutes. It can be argued but I don't think they necessarily should be in as exhibits. I have a further [123] objection that these regulations were not part of the Complaint, not part of the cause of action that was sued upon and I object to the entry of these exhibits as a basis of liability in this case.

The Court: We'll overrule the objection and admit 11 and the extent of which we'll consider it will be up to the Court when we're considering findings of fact and conclusions of law but we will admit the regulations as an exhibit and that will be marked as Plaintiff's Exhibit 11.

Mr. Libenson: Thank you, Your Honor.

I just have one other question of the witness and then he can be cross examined unless you want me to pick it up on redirect.

The Court: Go ahead.

By Mr. Libenson:

Q. Howard, did you see any other doctor—Strike that. Did you see any doctor of your own choosing in connection with the treatment of your injuries of January 13, 1978? A. No, sir.

Q. So Dr. ElAttar, who's employed by Jones & Laughlin Steel Corporation, is your treating physician? A. Yes, sir.

Mr. Libenson: I have nothing.

[124] CROSS EXAMINATION

By Mr. Murdoch:

Q. Mr. Pfeifer, as I understand your direct examination, you worked as a landing helper at Jones & Laughlin since about 1964. A. Near about, yes.

Q. How do the duties of a landing helper and a headman differ? A. The landing helper, the only difference the landing helper does not have to make the reports out or doesn't have to know as much about the fleet as the headman does.

Q. The headman actually could we classify him almost as an assistant foreman that working as a headman of a landing helper under you? A. Yes.

Q. And you would give as you're acting as the headman directions to those individuals working underneath you? A. I give them orders, yes. Different work and so on has to be completed.

Q. Landing helper is a Class 7 job, is that correct? A. Yes, sir.

Q. And did you state what a headman as far as that class was? A. It was 13 at the time.

Q. Am I correct that although you would be classified [125] as a landing helper as far as your base pay when

you would come out to work on a particular shift, you might be put into a different job classification? A. We usually schedule for the job classification. The job moves up by schedule.

Q. You would know in advance you might come out one week and work as a headman? A. Yes, sir.

Q. What other job capacities other than headman would you work in other than landing helper? A. Unless you're scheduled on the elevator.

Q. Had you at any time since you had been working as a landing helper been scheduled on the elevator? A. Yes, sir.

Q. What classification is that? A. Same as the landing man.

Q. That would be 13? A. Yes, sir.

Q. Were you a tugboat operator at all? A. Yes, sir.

Q. And did you have any limitations as to when you could operate the vessel? A. I was more—At first, no then I took a test and was colorblind and stipulated daylight.

> The Court: I'm having trouble hearing you, sir. [126] Do you want to just talk into the mike? You don't have to look back at me. Just talk into the mike.

A. I was working night shift and according to the regulations, I was supposed to be colorblind and I was scheduled daylight operation.

By Mr. Murdoch:

Q. When was the last time you would have operated the harbor motor vessel? A. That I can't answer because I don't know what date it broke down or that.

Q. They no longer have the boat or vessel, is that correct, the harbor boat that you operated? A. Not to my knowledge they don't.

Q. You don't recall when the last time was when you actually— A. No, sir.

Q. Friday the 13th, Mr. Pfeifer, do you recall what day of your work week that was? A. Not exactly because I changed my schedule.

Q. That would vary from time to time? A. Yes, it does.

Q. Would you normally work one particular shift as opposed to any other shift back at the time of this accident? A. Our shifts were from 4 to 12 and 12 to 8.

Q. Would you ever work daylight? [127] A. No, I didn't work daylight then.

Q. Do you recall how often before January 13th, 1978 you would have worked as a headman?

Mr. Libenson: Is that question how often?

Mr. Murdoch: Yes.

Mr. Libenson: I'm going to object to the question because I don't know if he means on a weekly basis or the day before, I don't think it's clear.

The Court: Clarify the question, Mr. Murdoch.

Mr. Libenson: I'm not objecting to the point of inquiry.

By Mr. Murdoch:

Q. You had worked I assume as a headman before January 13th, 1978. A. Yes, sir, numerous times.

Q. And from the time you started as a landing helper in 1964, had you worked as a headman from 1964 at periods up through the date of the accident? A. I wouldn't go back quite that far but I had worked headman off and on shortly after I went to the landing.

Q. Do you recall how long you were working as a headman prior to January 13th, 1978? A. No, I don't know how many times, I can't—

Q. I'm sorry. It's a poor question again. You don't recall what date of your shift Friday the 13th was. You have [128] already testified to that but within that time period, let's say the month before January 13th, 1978, had you been working as a headman at all? A. Off and on different times, yes.

Q. Nothing steady? A. Nothing steady, just fill-ins.

Q. You came out to work on Friday the 13th at about 11 p.m. as I recall. A. Yes, sir.

Q. And you knew in advance you were going to work as a headman? A. Yes, sir.

Q. What did you do when you first came out after you changed into your work clothes? A. After I changed into my work clothes, I went over—looked over the reports and that on the desk.

Q. Where are these reports kept? A. In the pump boat on the desk at the landing.

Q. Why is it necessary, Mr. Pfeifer, for you as a headman to look at these reports before you start your shift? A. You've got to know what part—

The Court: I couldn't hear you.

The Witness: You have to know what part loads are already out and made and which—

The Court: Did you say which part loads?

[129] The Witness: Part loads, yes, sir. On some barges depending on the type of coal you had part loads that take half of the barge or part of the barge out and kick it out and put another one under.

By Mr. Murdoch:

Q. What are these reports called? How are they classified? A. They're landing reports.

Q. Landing reports? A. Yes, sir.

The Court: Excuse me, I'd still like to clarify this partial load. You mean because of the kind of coal it was you might unload half a barge of one kind of coal and then move another barge in and unload half of it?

The Witness: You might unload half of one barge and put another barge in and unload all of it and later on take a part load back again and finish it.

The Court: All right.

By Mr. Murdoch:

Q. Whose responsibility is it on each shift to fill out these landing reports? A. The headman's.

Q. So then when you come out to 12 to 8 sometime before you finish your shift, you would fill in some part of the landing report form? [130] A. Yes. You have to fill in the empties and the part loads and how many full barges was on hand.

Q. Is that for the entire fleet of barges? A. Yes, sir.

Q. So that if you picked up a landing report, that should reflect the barges that were in the fleet for that particular shift? A. Yes, sir.

Q. And that's the headman's responsibility? A. Makes the report out, yes.

Q. After you come out and you looked to see what the landing report was from the 4 to 12 shift, what did you do then on January the 13th? A. You usually wait until the foreman calls you and gives you a line up of what barges he wants at the elevator.

Q. Was that done in this particular instance? A. That was done that particular night, yes.

Q. And who was the foreman? A. Sherman Haddix.

The Court: Sherman—

The Witness: Sherman Haddix.

By Mr. Murdoch:

Q. He gave you then some type of information as to what you would be doing during your shift? A. The order of the barges that he wanted and [131] particular rotation that they were supposed to be in.

Q. Does he tell you that or does he give some type of a written form? A. Sometimes they tell you on the phone and sometimes they send you down a slip of paper with them written down on.

Q. Do you recall what happened in this instance? A. I don't know which way it was. I mean if it was sent down on a slip or it was called down because there was never no set pattern.

Q. When you say called down as a possibility, you would be in the pump boat? A. Yes, sir.

Q. Where would the telephone call come from? A. The office.

Q. The office? A. Yes, sir.

Q. Where is that located in reference to the pump boat? A. It's up on the bank downriver somewhat behind the elevator.

Q. At that particular time when you're in the pump boat and you get the information from the foreman, are the other two members, the other working people are they present with you? A. Most generally, yes.

Q. And you already testified they were Mr. Hicks and [132] Mr. Tadder, is that correct? A. That's correct.

Q. Do you recall them being present at that time? A. Like I said, it was a—If a slip of paper, one of them most likely brought it down. I believe it was a call down that evening and they would have been there.

Q. You stated that I believe on direct examination these would be the only two men working on the river with you, is that correct? A. That's right.

Q. Is there a hoist boiler who would normally work your 12 to 8 shift? A. A hoist boiler works the 12 to 8 shift, yes.

Q. Was there one this particular night? A. Yes, but he's not with us.

Q. Well, let me ask you this then. When you say not with us, how many other people would come out on the 12 to 8 shift and work in the area of the elevator down on the cribbing or out on the barges?

Mr. Libenson: Objection, Your Honor. I think he'd have to define it a little more limited because when he says in the area, that takes the whole river and all the land that the plant occupies along the river. I'm now trying to be cautious and I might suggest that maybe he ask as to Landing 1 where the plaintiff was working.

[133] The Court: Is that what you call this place, Landing 1?

The Witness: Yes, sir.

By Mr. Murdoch:

Q. Answer it on that basis if you would, sir. A. There was three at Landing 1.

Q. Who's that? A. It was myself, Walter Tadder and Hicks.

Q. Where does the hoist oiler work? A. Down below the hoist at the barge shanty.

Q. How far is that from Landing No. 1? A. Possibly 300 feet, 400 feet.

Q. Is he under your jurisdiction at all as a headman? A. No, sir.

Q. Under whose jurisdiction would he be? A. He's under the hoist man's jurisdiction.

Q. Is the hoist man another individual who would work down in the area where the oiler works? A. Yes, sir.

Q. Who else works in this area? A. A barge helper.

Q. What does he do? Do you know? A. Help change barge and that when it comes time to change.

Q. Would he help you and your two individuals? [134] A. No, sir.

Q. He's strictly down at the other area? A. Down at the other end.

Q. Do you know, sir, if those three individuals or three individuals regardless of whose identity they would be were working the night you were injured? A. Yes, they were working.

Q. I believe you stated it was snowing at the time you came to work, is that correct? A. Yes, sir.

Q. Was there snow on the ground at that time? A. Yes, sir.

Q. Had it snowed? A. A little bit.

Q. Had it snowed the day before the 12th? A. It started about 10 o'clock that evening before.

Q. At some point in time when you came out to work on direct examination you stated that you asked Mr. Haddix the question—a question regarding salt, is that correct? A. I asked him for extra help and salt.

Q. I'll get to the extra help in a minute but if we can limit it to the salt at this time— A. I asked for salt, yes.

Q. What was the purpose for asking for extra salt? A. To get some around because it was getting slick.

[135] Q. Where is the salt normally kept? A. Normally?

Q. Yes, sir. A. On the front of the pump boat.

Q. Was there any there that night? A. No, sir.

Q. Who has the responsibility at Landing No. 1 to make sure that there is salt or if there isn't salt to at least get salt? A. That was the daylight job to keep salt on the landing and whichever way it was in bags or buckets it was brought down that way.

Q. Let's assume though that as you relate it there is no salt. Whose responsibility is it on the 12 to 8 shift? A. It's the foreman's responsibility.

Q. Why do you say that? On what information do you base that? A. Because we were supposed to have extra help in bad weather and it's for that purpose to salt the cribbings and everything.

Q. I understand the purpose, sir, but on what information do you base your statement that it was the foreman's responsibility to make sure that there was salt available? A. Because we couldn't leave. We had our [136] responsibility right there. We wouldn't possibly leave and walk off our job to get salt.

Q. When did you ask Mr. Haddix for salt? A. That was shortly after starting time.

Q. Would this be about the time you were waiting for your directions from him as to what barges to move? A. Right near around the same time, yes.

Q. Do you recall if you asked him personally or did it by telephone regarding the salt? A. It was by telephone.

Q. Did Mr. Haddix—Was he down at the landing that evening? A. Yes. He come down that evening during the shift. What time I couldn't exactly say because I don't know exactly what time.

Q. His responsibilities cover a wide area of ground, don't they? A. Very much so.

Q. What did you specifically ask for as far as salt is concerned? A. I just asked him to get some salt down there, that's all.

Q. What was his response? A. He had no one to get it down with.

Q. Did you request time off for either yourself or [137] Mr. Tadder or Mr. Hicks to go get salt? A. We had no time. We was busy trying to get the elevator, the barges dug out of the fleet for the elevator.

Q. So you didn't ask then, is that your answer then?

Mr. Libenson: Objection, Your Honor. I think the answer is responsive.

Mr. Murdoch: I don't think it was, Your Honor.

The Court: We'll let him probe on cross.

By Mr. Murdoch:

Q. My specific question was, Mr. Pfeifer, whether or not you specifically requested of Mr. Haddix that you go get salt or have Mr. Tadder or Mr. Hicks get salt. A. No, because I did not ask him for time off.

Q. At what point in time during that 12 to 8 shift on January 13th did you request extra help? A. At the same time I was inquiring for the salt.

Q. And what was the purpose of requesting extra help, Mr. Pfeifer? A. We needed extra help down there

that night if we couldn't keep up with all the work that was to be done.

Q. What type of work are you talking about? A. We had barges to check and pump and service the elevator, change barge and you can only be at one place at one time.

Q. I believe you testified on direct examination that [138] it takes one hour to unload a barge, is that correct? A. Approximately one hour.

Q. Do you have any present recollection as of from the time you came out at midnight until you were injured how many barges were unloaded? A. No, sir, I have no idea.

Q. I believe you stated it took 15 minutes with a boat to move a barge, is that correct? A. Approximately 15 minutes to change barge.

Q. Do you yourself have anything to do with moving barges if the boat came in to do it? A. Yes, sir.

Q. You and Mr. Tadder and Mr. Hicks all helped? A. Yes, sir.

Q. What vessel, motor vessel was available that night? Do you know? A. I don't know what the name of it was. It was one of Zubick's.

Q. Would it be the Sidney Johnson? Does that sound familiar? A. No.

Q. I'm sorry. I didn't hear you. A. That doesn't sound like the name that was on that night.

Q. You had mentioned Nancy Jane. [139] A. We had called Nancy Jane from landing to—

Q. That's a different boat than the one that was there? A. Yes, sir.

Q. Do you have any idea between midnight and the time you were there, which I think you testified was

around 4 a.m., as to how many barges were moved either by the boat or without help of the boat? A. I don't recall how many we moved.

Q. Are there any records that are kept during a particular shift that indicate this? A. Not really would indicate it because you'd have to have the—Even the landing reports wouldn't show it because sometimes you have to move other barges to get barges you need out of a fleet so it really wouldn't show how many barges were moved.

Q. When the towboat or motor vessel would come up to help, do you know if on that particular night they had a full complement, a full crew? A. I don't know what's on that, the boat.

Q. What would normally be the crew or the makeup of the crew on the motor vessel? A. They had to have their operator there was usually who was on it.

The Court: Are you referring to the Nancy Jane or [140] the other one?

Mr. Murdoch: The unknown one, Your Honor.

By Mr. Murdoch:

Q. Do you know if there would be any other crew members other than just the operator itself? A. Not normally.

Q. Your answer is that the operator is normally the only person on the vessel, is that correct? A. Yes.

Q. What made this night between—at least between midnight and 4 such a busy night? A. Where the barges were situated at one thing kept us going continually then some of the wires that night I can recall were bound on extra tight and we had a devil of a time to get them loose to get them off the other barge.

Q. Was the elevator working more than it was—than it normally was? A. About normal.

Q. Do you have any idea how many tons they move? A. On the elevator?

Q. On a given shift? A. Not all total on a given shift.

Q. If you had gotten salt or let's assume there had been salt available, whose responsibility was it to put the salt on the gunnels? [141] A. If we had had time, it was our responsibility.

Q. That is normally what the headman— A. After we have our barges pull for the elevator, then we check our fleet for what needs pumped and if we have time, we salt and clean off and so on like that, clean up around.

Q. Was Mr. Tadder and also Mr. Hicks were they with you the entire time from 12 to 4 until the time of the accident? A. Yes, sir.

Q. All doing the same type of work involved with helping each other? A. Yes, sir.

Q. If you came out as you did on that particular instance on January 13th if there had been a leaking barge which was visible on the 4 to 12 shift, would you as the headman have any way of determining that from the prior shift or from any records? A. Usually determine a leaking barge by walking up the cribbing you look over your fleet and if you see one lower than the other, then you know it has to be checked.

Q. All right, sir. That's what you do as part of your responsibility as the headman? A. Yes, sir.

Q. Do you have the responsibility as the headman when you go over the—to go over the entire fleet to look for [142] leaks? A. You have to go over and check for the depth if it's got water in them then they're ones that have to be pumped.

Q. If you can try to listen to my specific question, Mr. Pfeifer, as a headman, is it your responsibility when you come out on a particular shift to walk over the entire fleet of barges at that landing, Landing No. 1, to see if there are any leakers?

Mr. Libenson: Is your question directed to just as he starts or is it anytime during the shift?

Mr. Murdoch: It's specifically at the time when he comes out to work.

A. You don't have time specifically when you come out to work to go over your whole fleet and check it before you start.

Q. At any time during your particular 8-hour shift as a headman, is it your responsibility to go out to determine whether or not there are leakers on the fleet? A. You check them while you're working.

Q. Is it your responsibility? A. It's everybody's responsibility to check them to see if they see they're low in the water and check to see if they have water in them.

Q. If there had been a barge that was a leaker on the [143] 4 to 12 shift whether or not they had pumps in it or not, would the 4 to 12 shift leave any message for you as the headman that a particular barge was leaking? A. Not always. If they had a pump in it and sometimes they put a pump in them and figure you'll see the pumps going there you'll know to check it.

Q. When you came out on this particular shift, did you walk over the fleet to determine when you started whether or not there were any leakers? A. No, I didn't walk over the whole fleet.

Q. How many different types of pumps were available at Landing No. 1 at the time of this accident? A. One.

Q. What kind is that? A. Electric motor with—I don't know what—It's a new style pump with an electric motor.

Q. Do they make a distinction, Mr. Pfeifer, that you were aware of between a C pump and a DC pump? A. They were just new ones they had started with and they were of a different phase or something than the old pump.

Q. What would you call the old pump in your river experience? A. As far as I know, the normal ones we regularly use.

Q. How would you call it? Did you call it a C? A. I think they're a C pump.

[144] Q. That's an electric motor pump? A. It's an electric motor pump that was fired off the pump boat.

Q. Were you familiar at this time with the DC pump? A. We just started with these new pumps and the new ones I wasn't even really too much familiar with.

Q. But would I be correct that the new type would be called a DC as opposed to what you normally used as the AC pump? A. They were almost the same type pump just different wiring went to them and different current.

Q. Did you have any designation for the new type pump? A. Yes, sir.

Q. What was that? A. Always use one pump to a lead wire and also a breakerbox in front of the head.

Q. If you were going to give directions to Mr. Tadder or somebody working under you to get a particular pump, would you say: Get a AC pump or DC pump? A. We only had the one type pump.

Q. So I understand your testimony on January 13th, 1978, the day you were injured, is it your testimony you

only had the one type of pump at Landing No. 1? A. Yes, sir.

Q. Do you mean that they only used the one type of [145] pump at that landing or that was the only one available at the time you wanted to use it? A. There were three pumps available which two of them was in use and when I got hurt, that's when we put the third one into use.

Q. Were there any gasoline pumps available? A. No, sir.

Q. Were there any gasoline pumps ever kept down at Landing No. 1 for use in pumping out these barges? A. Previously there had been a couple of them around but they broke down and was gone.

Q. So it's your testimony then that there were only three pumps at Landing No. 1 at the time you were injured and only one of those was available for your use, is that correct? A. Yes, sir. The other two were in use.

Q. Do you recall what barge numbers those other two pumps were in use on? A. I don't know the number of the barge. It was on the second coupling on the outside of the fleet. It was in use at one barge, the one pump was in the upriver gunnel of the 1384.

Q. That's the barge that you fell on, is that correct? A. No, sir.

Q. I didn't mean to say that. You fell on 1011 going to 1384. [146] A. Going to 1384.

Q. Do you have knowledge as to whether or not those two barges were actually owned by Jones & Laughlin? A. They're J & L barges so they must have been owned by them or leased by them.

Q. The point of my question though in that particular fleet aren't there barges brought in that are owned by other companies? A. Oh yes, Ohio River.

Q. But to your knowledge these were in fact owned by Jones & Laughlin? A. Yes, sir.

Q. How do you retain the numbers of these barges as being the one you were going to and the one you slipped on out of a fleet of 55? A. I just remembered the numbers.

Q. Did you make an effort, Mr. Pfeifer, after you fell to determine what the numbers of these barges were? A. I wasn't back out on the fleet after I got in off of it.

Q. You talked yesterday in your testimony about some barges starting to break away. A. Yes, sir.

Q. What time of the morning did that happen? A. Approximately 3:30.

[147] Q. This would be shortly before your accident, is that correct? A. Yes, sir.

Q. How long did it take you to tie these barges up? A. We had to get the Nancy Jane up to shove them on in. The boat was there was holding one barge and couldn't shove them in and we had to get the Nancy Jane to shove them in.

Q. What time period would we be talking about from the time you noticed this condition until the time that you were secured? A. I'd say 15 minutes.

Mr. Libenson: When you say condition, you're talking about the breaking away?

Mr. Murdoch: Yes.

By Mr. Murdoch:

Q. Do you have a record as to what you were actually doing between 12 a.m. and 3:30 as to your duties? A. No, sir, I don't have no records. I didn't keep no listing on every move or anything.

Q. You're not required to do that, is that correct? A. No, sir.

Q. At what time, Mr. Pfeifer was it determined by you or somebody on your shift that this particular barge I believe 1384 was leaking? A. We went down to change the barge right before we [148] went to gather up the pump when we saw it was getting lower in the water.

Q. At any time—I'm sorry. What time was this though? A. That had to be between the time we pushed them right around the time we tied them barges up we had to be down there changing barge.

Q. Who noticed this barge in that position? A. I don't know which one it was. It was one of us.

Q. Do you know if you were on 1384 at anytime that shift before you observed it listing? A. No, sir.

Q. You had not been on it? A. No.

Q. Do you know if either of your co-workers would have been out there for any reason? A. No, I do not.

Q. You don't know, is that your answer? A. I don't know if they would have or not.

Q. And I believe you already testified that there was one pump in the gunnel, is that correct? A. Yes, sir.

Q. 1384 is what, a 200 foot? A. 175.

Q. That's what we call a standard barge? [149] A. Standard barge.

Q. Was this particular barge you have talked about couplings, will you explain to me what a coupling is? A. A coupling is where the tiers of barges you have we call each one have coupling and you're—

Q. And how many couplings did you have then? A. Five.

Q. So I understand it, your first row of barges closest to the elevator is coupling 1? A. Yes, sir.

Q. And as you placed barges alongside of each other going out into the middle of the river, that would give

you five couplings? A. No. Going up the river would give you five couplings one behind the other end on end.

Q. You would have five barges lengthwise tied end on end as one coupling, is that right? A. No. Each one of them barges is a coupling tied end on end. Each barge would count as one coupling. Your first barge would be No. 1, second barge would be No. 2, third barge would be No. 3, so on to No. 5.

Q. How many barges would you— A. When you count abreast, it's going side by side.

Q. The string of barges closest to the elevator as they're end on end, how many barges were in that particular [150] coupling? A. End on end?

Q. Yes. A. Three.

Q. How many different couplings did you have extending out into the river? A. Some places there was six, some places it was probably eight.

Q. I guess I'll try to limit my questions then to the area where Barge 1384 was. What coupling would that be in as far as going from the string closest from the elevator? A. It would be the third barge out.

Q. How many barges back? A. In the first coupling.

Q. What would that be tied to? A. 1384.

Q. How do you secure that barge? How did you secure that barge? A. It was tied onto the barge on each side of those tied to it it was secured.

Q. Then there would be a barge tied to the one end of it, is that correct, the second barge in that coupling? A. No, it wasn't. There was a duck pond in between.

Q. What about on the other end of the barge? Was that secured to anything? [151] A. They're tied side by side.

Q. I understand that. A. But they're not wired up or anything, no.

Q. If we have 1384 sitting here, you have one barge on this side, you have one barge parallel to it on this side, you have a duck pond to the bulkhead on this side, what is on the bulkhead on this side? Is it against anything? A. No, sir. That's where your duck pond is at on the end of it.

Q. Was there a duck pond on both ends of it? A. The river was open on the one end of it.

Q. That was my point. A. There was nothing because about that time we had about three barges down at the elevator and that's where we tied them at was on the lower end. If you put another pier down, that would be your barges going under the elevator.

Q. How far from the pump boat was Barge 1384? A. Two couplings.

Q. How far out would it be from the cribbing where the elevator is if you go straight out? A. How far out?

Q. Yes, sir. A. Approximately would be four barge widths out.

Q. What's a barge— A. 26 feet.

[152] Q. Which end of Barge 1384, which bulkhead was going down? Was it the bulkhead facing the duck pond or the area facing the river? A. It was facing the duck pond.

Q. Who made the decision then to put a pump into this? A. We knew it had water in it and when you find a bulkhead full of water, it's got to be pumped.

Q. Did you open any type of hatch cover to look into the bulkhead to determine how much water there was? A. Yes, sir, the middle hatch. It's right in the middle of the bulkhead.

Q. What did you observe? A. It was full of water.

Q. As you're standing on that bulkhead and the barge is in front of you, on which gunnel was the pump already in? A. It was in the right-hand—As I was looking downriver, it was on the right-hand side, right before you get to the first quarterhead in the upriver end.

Q. Was that pump operating at that time? A. Yes, sir.

Q. Do you know whether or not anybody on your particular shift put that pump into the hatch cover, the one that was already there? A. No. It was already pumping when we went out.

Q. When did you first observe that pumping? [153] A. I saw that one pumping when I walked in.

Q. As a headman, do you have any responsibility when you see something pumping to go out there and look at it to make sure it's being taken care of adequately? A. We check them as we get around to them.

Q. So what you're saying then is the mere fact that there's a pump operation doesn't give you any impetus to go out and look at that barge right away?

Mr. Libenson: I'm not sure my client understands that word.

A. If it's pumping water, you know it's pumping.

Mr. Murdoch: He answered.

The Witness: There's no reason to get excited about it.

By Mr. Murdoch:

Q. You know it's pumping, Mr. Pfeifer, but how do you know until you get out there as to whether or not it's enough? A. You never know if you're going to have

enough. We found the bulkhead full so we hurried up and got a pump working because it needed pumped out.

Q. How did you get to that particular barge when you first observed it leaking to go onto the bulkhead to look into it? A. We come back from the lower end and walked up the gunnel of it to pull the hatch cover off to see how much water [154] was really in it or where the water was really at.

Q. Did you have to walk over the gunnels or deck ends of any other barges to get out there look to the bulkhead 1384? A. Yes, sir.

Q. Did all three of you go out to look into the bulkhead? A. We were all three out there.

Q. Do you remember how many barges you walked across whether they were gunnels or deck ends to get out to 1304? A. We walked across two.

Q. Do you recall what their numbers were? A. No, I don't.

Q. Would either of those have been 1011? A. No, because it was behind us.

Q. When you observed the water, the bulkhead— A. 1011 was behind us so it couldn't have been. You confused me about the question a little bit. 1011 was behind us so it couldn't have been.

Q. I'm not trying to confuse you. A. When I was coming back to first check it—

Q. We have already established that 1384 was in the third coupling. A. First coupling.

Q. I'm sorry, first coupling. But the third row out [155] into the water. Where would 1011 be with reference to 1384? A. Right behind it.

Q. When you say behind it, is it in the second coupling there? A. In the second coupling right behind the duck pond.

Q. You're on the bulkhead of 1384 you observed water? A. Yes.

Q. At that point and time did you know where the pumps were that you had to go to get to put into the bulkhead? A. No, I didn't know exactly where they was at.

Q. How did you go about determining where they were? A. Two of the boys walked up to the barge to get to look for a leg and one of them spotted a leg and he hollered and the other one went to get one of the leg wires.

Q. Where were you at this time? A. I was looking for a motor that could be spared long enough to put on it.

Q. You had gone off 1384 to look for the motor, is that correct? A. Yes, sir.

Q. When you found the motor then, were the other two gentlemen near you with the pieces of equipment they had picked up? A. They were on their way on down with them ahead of me.

[156] Q. Were they walking ahead of you? A. Yes, they were going on down. I don't even know if they took the same route I did which I don't think they did. They picked the leg out of another barge and took down and the other boy got the lead wire from over by the cribbing to run down to it.

Q. What route did you take from 1384 to go look for the motor? Do you recall? A. Not right off hand.

Q. Were you on 1011 at all when you were leaving to get the part or to get the parts for the pump? A. That I don't recall even.

Q. You were coming back then and why did you go on to 1011 to get to 1384 if you'll tell me. A. I found the motor in the pump boat so I come out of the pump boat

which was between the second and third coupling and crossed one barge and crossed onto 1011 and started down to get down to 1384 and we were trying to get it in as quickly as possible. We didn't know how much was in the body of the barge that evening.

Q. Do you know in fact that there was water in the body? A. Yes, sir. It was pumping full force.

Q. From where, the one pump— A. Was pumping already.

[157] Q. Are you sure that 1384 was a loaded barge? A. Yes, sir.

Q. Will you describe for me again, sir, what equipment you were carrying and what manner you were carrying it? A. I was carrying a motor for a pump and a breakerbox and I had them on my shoulder and was walking along holding the breakerbox like that. (Demonstrating.)

Q. You have already described the pump motor as being 18 inches by 12 inches and 80 pounds, is that correct? A. Approximately.

Q. Did you state yesterday that the breakerbox was five to ten pounds? A. It ain't much to it I know that.

Q. The breakerbox is approximately four inches and probably three wide with two pigtail wires and two lead wires on it with plugs on each end.

Q. Were you aware as you were walking back on the gunnel of 1011 that there was snow on the gunnel? A. Yes, I was aware there was snow.

Q. Can you tell me how you were walking? A. I was walking fairly straight down the gunnel.

Q. Were you shuffling your feet, taking a normal step? A. I just—Well, I was walking pretty normal then [158] I went around the timberhead that sets on the gun-

nel and I was just getting started out again when my feet went out from under me.

Q. I believe you testified you had gone you think about three quarters of the way across the barge and 75 feet I guess it's a little more than three quarters. A. Yes, a little better.

Q. At the time you fell, do you know where Mr. Tadder was? A. He was down on the other barge trying to insert the leg into the barge.

Q. Did you observe him doing that while you were walking? A. No. I was watching where I was going because it was snowing and blowing.

Q. Where was Mr. Hicks do you know? A. No, I don't know.

Mr. Libenson: Did you ask him now or at that time?

Mr. Murdoch: At that time.

By Mr. Murdoch:

Q. I meant at the time that you fell. A. I don't know exactly where he was.

The Court: I missed your answer where Mr. Tadder was.

[159] The Witness: Mr. Tadder was on the bulkhead of the pump that needed pumped.

The Court: On 1384?

The Witness: On 1384.

By Mr. Murdoch:

Q. When you fell, did you attempt to grab hold of anything? Did you let go of the breaker box, the pump motor? A. There was nothing to grab.

Q. Did you let go of anything to try to break your fall? A. I throwed my arm out with the box to try to catch my balance and I didn't do it.

Q. With the breaker box? A. Yes, sir.

Q. Did that go into the barge or into the river or were you able to maintain a grip on that? A. I held onto it.

Q. Is there a handle on that to hold? A. I had to hold the rubber cable.

Q. What happened to the motor then? A. It came down and landed right on my lap. When I went down, it came right down on my lap then.

Q. Did you holler for help at that time for either Mr. Tadder or Mr. Hicks to help you get up? A. I hollered for one of them and I looked and I saw [160] Walter was busy with a leg in his hand yet and I didn't see where Mr. Hicks was right at the time so I picked up my hat, it flew off my head and I rolled the motor off to the side and I managed to sit there a little bit and I finally twisted around until I tried to get back to my feet.

Q. What did you do then, sir? A. I picked up the motor and continued on down and across the bulkhead of the barge.

Q. Did you then finish putting the pump together or doing something with the pump? A. Walter had the leg down and he come over and got the motor from the end of that barge and took it down and I crawled down off that barge and went on down with him and held the flashlight while they finished hooking the wire and the breakerbox and the motor I held the flashlight for them to see what to hook the pump up.

Q. Can putting together the pump be done by one individual? A. No. It's pretty hard. It can be done but it's awful hard because you've got to look in between the

spokes where the head sets on to line up the two guide pins that make it turn.

Q. Is it done by one man at times? A. Very rarely.

Q. Does that hold true for the other pump too as far [161] as how it gets together? A. Yes.

Q. Did you have any discussion or did you tell either Mr. Hicks or Mr. Tadder when you got to the barge No. 1384 that you had fallen? A. He knew it. Walter knew I fell.

Q. Did he say how? How do you know that he— A. Because he told me. He said, "Just stay there" when I got over to the edge of the barge, he said, "Wait a minute and I'll take the motor from you."

Q. When you say crawled down, Mr. Pfeifer, were the barges different heights? A. Different heights in the fleet.

Q. 1011 was higher? A. A little higher out of the water than the one sitting alongside of it was.

Q. Approximately how high? Let's say how high was the gunnel of 1011 above the gunnel that you normally have stepped on to go to 1384? A. Possibly three feet.

Q. Is that because of the amounts of coal? A. Amounts of coal in them, the way it's loaded.

Q. This accident happened about 4 o'clock? A. About 4 a.m.

Q. Did you report this to Mr. Haddix? [162] A. I couldn't get ahold of him at first because he was out on another job somewhere and I couldn't get ahold of him. Finally I did call up.

Q. Approximately what time did you call him? Do you recall actually getting through to him? A. I think that was getting around quarter of seven or 7 o'clock even.

Q. Did you continue to work from the time 4 o'clock until the end of the shift or at least until you reported to Mr. Haddix?

Mr. Libenson: Will you define work?

By Mr. Murdoch:

Q. Do your duties. A. No, I didn't do—All I did was fill out my report and went down to walk to—walked real slow down to the lower landing because I was in pain all the time and I took the reports back to the office hoping to see Mr. Haddix down there and he wasn't there and I come back down to the pump boat.

Q. When you talked about the reports that you fill out, again are these the landing reports we talked about prior? A. Yes, sir.

Q. Are there any other types of reports you fill out? A. No, sir.

Q. In the landing report, would you as the headman [163] list anything about Barge 1384 or any barge in that particular condition? A. You mean about leakers?

Q. Yes, sir. A. It wouldn't go on that report.

Q. Would it go on any report? A. It does on a slip that we leave on the desk. If we've got a bad leaker, we mark it down on a slip on the desk for the next man coming on.

Q. That gets back to my question that I asked you sometime ago. Wouldn't the 4 to 12 shift leave you a note like that if during that shift they had a leak? A. Sometimes they did. Not all the time though.

Q. Would you or did you in fact report the condition of 1384 to Mr. Haddix? A. I don't remember at this time.

Q. You don't know if you did but in a barge in the condition as you have described it, would it be normal for you under the circumstances to tell a foreman about that? A. Normal just to get a pump and get it pumping.

Q. Am I correct then that it's not normal? A. You don't always have to. It you've got pumps to make it available to pump it out, you can get it pumped out. If it rises out of the water, you know you've got it—you've gained on it.

[164] Q. The barges that you had some difficulty with around 3:30 that started to break away, is that something you would normally put onto your landing report? A. No, sir.

Q. Is it something that you normally would report to the foreman? A. If he happens to be handy. As I recall, he was down around that turn.

Q. Do you have knowledge as to whether or not he observed that? A. I don't have that knowledge what he was observing.

Q. The manner in which you were carrying the breakerbox and the motor, is this the manner that you had been taught by J & L? A. Never taught by J & L. You carry the motor which was a convenient way of carrying it was throwing it up on your shoulder and carrying it where you had to go.

Q. Is that the way you normally carried it? A. Yes, sir.

Q. Would you normally carry the motor and the breakerbox at the same time? A. In an emergency, yes.

Q. And you considered this an emergency, is that right? A. Yes, sir, I did.

Q. Why did you consider it an emergency? [165] A. Because there was only about two and a half, three inches flashed on the upper end of the barge.

Q. You have no idea how long that condition was, is that correct, had been like that? A. Well, it was just getting worse right along because it wasn't like that when I come in on the start of the turn.

Q. How do you know that if you go out to observe the barges A. That's what I said. I observed that when I was walking up the cribbing pumping out there and you can tell just about the height of the barge when you see a pump running.

Q. Are these barges secured at all to the barge that is parallel to them? Are there lines tied from timberhead to timberhead at all? A. There's lines tied from timberhead to timberhead across the barges, yes.

Q. On 1384 was there a barge on either side of 1384? A. Yes, sir.

Q. Do you recall if they were loads or empties? A. They were loads?

Q. Do you recall whether or not 1384 was secured to these two barges timberhead to timberhead? A. Upriver end was timberhead to quarter end. Downriver end was timberhead to timberhead.

Q. Wouldn't that have an effect as far as buoying up [166] 1384 the fact that it was tied to these other barges? A. It secured them from floating away.

Q. It does have an effect as far as keeping it buoyed.

Mr. Libenson: What do you mean by buoyed?
Mr. Murdoch: I think that's obvious.

A. I don't think it does.

Q. Have you worked since this particular incident, Mr. Pfeifer, for Jones & Laughlin? A. No, sir.

Q. Is the tugboat whatever the name of the unknown tugboat or whatever the name of even the Nancy Jane is

that under your direction when you work as a headman? A. The tugboat, yes, the one that's working there.

Q. Yes, sir. A. It was but the Nancy Jane wasn't. It was on the lower landings.

Q. How many landings are there, two? A. Two, three, two co-landings really.

Q. And Landing No. 1 which you worked at that's under By-products? A. That's correct.

Q. Am I correct that Landing No. 2 is under Marine Ways? A. Marine Transportation, River Transportation Marines whatever.

[167] The Court: I'm not sure what the question means. What do you mean under—

The Witness: Landing 1 belongs to J & L Steel. Landing 2 is under River Transportation or whatever they want to—It's a different outfit altogether.

Mr. Murdoch: It's Jones & Laughlin but they're different divisions, Your Honor.

Mr. Libenson: Is it safe to say it has nothing to do with coal?

Mr. Murdoch: No, I don't think it makes much difference but Landing No. 2 is where they keep the fleet of barges mainly to be picked up by the boats when they're coming in.

By Mr. Murdoch:

Q. When the work is done at Landing No. 1, the barge would be taken to Landing No. 2, is that correct? A. They'd take it down to Landing No. 2.

Q. You had nothing to do with Landing No. 2? A. Sometimes we had to go down there.

Q. That has nothing to do with why we're here today, does it? A. No, sir.

Q. Are there shovels available at Landing No. 1 for use in removal of snow? A. Sometimes and sometimes they disappear with the [168] boats.

Q. What about January 13th? A. Not to my knowledge.

Q. Your answer is you don't recall seeing any but do you know if any were available? A. I don't know.

Q. Did you inquire into it? A. I didn't have no time to be shoveling.

Q. Did you inquire into it, Mr. Pfeifer? A. No.

Q. When you talked with Mr. Haddix and requested that salt be made available, did you inquire into shovels being available? A. No, I didn't. I didn't inquire into them.

Q. So I understand some of your testimony before I get into another area, describe for me what the weather conditions were when you came out and started working at midnight. A. The snow—It was snowing and blowing pretty good and it started to accumulate and had been snowing up from about 10 o'clock the shift before.

Q. Is it your testimony that when you have weather conditions like that that extra help is called out all the time or sometimes or what? A. Not all the time. Sometimes when you have bad [169] weather conditions, they'll double someone out or call someone out to help out.

Q. Was there any change at all as to the river pool whether it was coming up or going down at all? A. It was—We had a little bit of fast water I know that.

Q. That's not unusual for January though. A. No, it's not unusual.

Q. What's your present status of employment with Jones & Laughlin? A. You mean how long?

Q. I know you have have worked. Are you presently on pension with them? A. Yes, sir.

Mr. Libenson: I have a continuing objection to this, Your Honor.

The Court: Very well.

By Mr. Murdoch:

Q. Were you ever told by anybody by Jones & Laughlin as to what basis the pension was given to you? A. No, sir.

Q. Did you ever discuss with Dr. ElAttar what his findings were as far as certifying you eligible for pension? A. I had saw one copy he had there what all was wrong with me and that's the only one I ever saw.

[170] Q. Is it your understanding that your pension is a medical pension? A. Yes.

Q. At some point in time after the accident, did you make any claim or any request for benefits under the Longshoremen's and Harborworkers' Act? A. I just signed the one form through Hartford.

Q. Without talk—

The Court: I didn't hear that, sir.

The Witness: One form they gave me to sign it was for Hartford Insurance and that's the one—

By Mr. Murdoch:

Q. And you in fact have been receiving some type of payments from them without talking the amounts? A. Yes, sir.

Q. Are you presently receiving those payments? A. Yes, sir.

Q. They have never been stopped, is that correct? A. No, sir.

Q. Does weather affect your present condition? I'm sorry, your physical condition? Does it make you more aware of any aches and pains? A. It makes you a little more achey, yes.

Q. And did you have that before? A. No.

[171] Q. No pains at all? A. No, sir.

Q. You mentioned on direct examination that you used to farm, work a farm. A. Yes.

Q. Do you own a farm? A. No, sir.

Q. When was the last time you worked a farm? A. 1974

Q. Since the date of this accident, Mr. Pfeifer, have you gone out and made any application for any type of jobs? A. I have made inquiries and that into different types if that's what you're pertaining to. I've made inquiries into them, yes.

Q. Can you be more precise? A. I inquired into a mail job at the post office but you've got to be on your feet all the time and it's bending and stooping and lifting bags of mail.

Q. Isn't that also something you have to take the Civil Service exam for? A. Yes. I talked to the township road man to see if there was anything open that I could do there and there was nothing available.

Q. Have you taken upon yourself to go to any organization similar to what Dr. Novak said he works with that [172] evaluates persons to place them back into the job market? A. No, sir.

Q. Have you ever gone back to Jones & Laughlin and requested work since you have been on pension? A. No, I haven't.

Q. Was Dr. ElAttar the individual who discontinued the physical therapy in 1979 before you saw Dr. Novak? A. Yes, sir.

Q. The type of position that you hold now or held with Jones & Laughlin before your injury was that an incentive type job? A. Indirect incentive, yes, sir.

Q. You had worked for Jones & Laughlin for approximately 19 years before this happened. Was that job classification always an incentive job? Did you say indirect incentive? A. Indirect incentive.

> The Court: Excuse me. What do you mean by that? You benefited by the amount of coal that was moved?
>
> The Witness: Indirect you got a percentage of how much coal was moved up.

By Mr. Murdoch:

Q. Was that always the case for that particular job classification? A. No, sir.

Q. When did that change? [173] A. I don't remember. It was in our contract.

Q. Would you remember it might have been around '68 or '69? Do you have any recollection at all? A. I think it was in the early '70s.

Q. At that point and time or previous to that going into effect, was the normal number of men who come out on your shift more than what it was at the time you were injured? Would you have, let's say, a fourth man working with you? A. Not usually, no.

Q. Are you aware of the fact that there might have been another man who would have been working with you but after this incentive program came on that one man was taken off and duties were divided up among

your remaining workers? A. Yes, but I was alert. There was also supposed to be two men available for bad weather to more or less as laborers to fill in.

Q. Who alerted you to that? A. That was supposed to be in one of our contracts.

Q. Do you know in fact whether it was? A. I don't know which contract but I remember it being in one of them.

Q. Did you ever read that or is that something somebody told you? A. No. I believe I read it in the one.

Q. Were you in the habit of getting contracts and [174] reading them as they went into effect? A. I used to sit down and read different parts of it. If I got a break, I'd sit down and read a little part of it and maybe another day I'd read some more of it, keep up with the highlights.

Q. Well, do you have any recollection that prior to that incentive—After that incentive went into effect it was about that time that the headman and the landing man then had their own responsibilities of going out, seeing where the salt was, putting the salt on gunnels in bad weather? A. It wasn't only the headman's responsibility. That was to everybody working on the shift if you had the time.

Q. Everybody working under you? A. That's right, working with you, under you or however you want to put it.

Mr. Murdoch: If I might have one minute, Your Honor.

The Court: Sure.

(Pause)

By Mr. Murdoch:

Q. Mr. Pfeifer, on your direct examination, I believe you stated that you felt the elevator had been down, and you correct me if I'm wrong, sometime during the 4 to 12 shift. A. Yes, sir, it had for a period.

[175] Q. Does that mean that they're not moving coal through the mill? A. Yes, sir.

Q. Are you aware that back at the time of your accident there was a strike on, a mine strike? A. I don't know about that.

Q. Were you aware that coal might be brought in by railroad cars at that time in addition to being brought in by the barges?

Mr. Libenson: If Your Honor please, I think if I understand the thrust of this question, it's grossly misleading. The point isn't whether or not there was coal to be available and to be moved. The point is only that the elevator wasn't moving so that other work could be done on the barges and if they're bringing coal in by another means, obviously the elevator would be stopped because I assume they can't run it from two directions.

Mr. Murdoch: Your Honor, the inference is that the barge work was extra busy, the elevator was speeded up on the 12 to 8 shift because it was down 4 to 12 to get more coal in there and I'm trying to show that was not the case.

Mr. Libenson: No, I don't think the point was it was speeded up. The point was just to show that it was stopped for any reason whether mechanical or because they didn't have work or whatever the reason was when it's not running,

then [176] they have time for the other work and other duties. This they didn't have time for when it is moving.

Mr. Murdoch: I think that's an argument and saved for argument and not for evidence which I think evidence can give inferences.

The Court: We'll overrule the objection.

By Mr. Murdoch:

Q. Just to restate my question, are you aware that if coal comes in from other sources that the mill is continuing to work even though the elevator may not be hoisting coal itself? A. Yes, sir, I know it comes in by railroad car at different times.

Q. What kind of shoes were you wearing the day you fell? A. Boots, safety toed boots.

Q. What was the composition of the makeup of the sole? A. Neoprene sole and they were new shoes.

Q. How new? A. If I'm not mistaken, it was only the second day I ever wore them.

Q. When you go out to work in weather where there's snow, is it advisable to wear some type of overshoes over your work shoes to give you better footing or was that part of the job? [177] A. I never wore overshoes.

Q. Was that a decision you could make as to whether or not you wanted to wear them? A. Whether they wanted to wear them or not but they were just extra weight, that's all.

Q. You don't think they would have been any aid as far as walking? A. No, I don't.

Mr. Murdoch: That's all I have, your Honor.

The Court: Redirect.

REDIRECT EXAMINATION

By Mr. Libenson:

Q. In connection with the bad weather operations, were you ever told by your foreman or anybody that you were to ask for time off to get salt? A. No, sir.

Q. Were you ever told to leave the landing and look for extra help? A. No, sir.

Q. You didn't have any authority to get extra help anyway, is that right? A. I didn't have any authority to do it.

Q. You had testified that it takes an hour to unload a barge and 15 minutes to set it up under the elevator, is that correct? [178] A. Yes, sir.

Q. Is there any set period of time that it takes to pull a barge out of the fleet to get it in position next to the elevator? A. No, sir. you don't know where they're at. You might have to dig them and if they're buried, you have to dig them out.

Q. That can take how much time? A. That can take up to a couple of hours to get it dug out.

Q. To get a particular barge? A. Yes, sir.

Q. So the fact that it takes an hour to unload and 15 minutes to replace it at the elevator doesn't mean that you have 45 minutes between barges, is that right? A. That's right.

Q. And on the night you were injured on January 13th, 1978, were you digging barges? A. Yes, sir.

Q. And from the time you started until the time you were attempting to put this pump into 1384, had you had any time to do any of this pump work? A. No, sir. We had been on the fleet continually from midnight.

Q. This was involved with what? [179] A. Pulling barges and digging them out of the fleet and that to get the elevators set up.

Q. When you say digging out a fleet, that means you have to bring the motor boat over and tie it up? A. Face up.

Q. Face it up and they pull it or move it? A. They pull the barges. If it's in the second coupling or third coupling, you've got to pull the two barges up out end and secure them again and put one in the hold.

Q. And this is not a production type job where you know exactly how long it's going to take on a particular barge, is that right? A. That's right. You never know.

Q. Bad weather conditions make this work hard? A. Yes, sir, very much.

Q. Do you have any educational or experience qualifications to do anything other than hard labor? A. No, sir.

Mr. Murdoch: Objection, Your Honor. He hasn't made any study and gone out to the Bureau of Vocational and Rehabilitation agencies so I don't think he can answer that.

The Court: We'll sustain the objection.

Mr. Libenson: You sustain that objection?

The Court: Yes.

[180] By Mr. Libenson:

Q. Have you ever done any kind of work, any clerical work? A. No, sir.

Q. What's your ability to read and write? A. I have a seventh grade education and that's not very good.

Q. Have you ever tried to do any kind of work other than the work that you did at J & L in the last 20 years? A. I've farmed a little bit on the side and that.

Q. Do you feel qualified to do anything other than labor work?

Mr. Murdoch: Objection. That's not the determination.

Mr. Libenson: That's what he feels.

The Court: We'll permit the witness to answer.

A. No, sir, I'm not qualified. I don't know no other work.

Q. Did Jones & Laughlin Steel Corporation since the date of your accident offer you any other type of employment? A. No, sir.

Q. Did they offer you any employment? A. No, sir.

Q. Did they suggest that you go to any kind of rehabilitation counseling? [181] A. No, sir.

Q. And you say in 1978 you did look for work? A. Yes, sir.

Q. And this was this township job? A. That's been since 1978 I've inquired into this township job, yes.

Q. Were you successful in getting that job? A. No, sir.

Q. Do you know why? A. I couldn't pass the physical.

Q. How about the mail job? Were you successful in getting that? A. No, sir.

Q. Why weren't you—A. I needed a physical there too.

Q. Up to the time of your injury, had you worked steadily? A. Yes, sir.

Q. Did Mr. Haddix come to No. 1 landing, the landing where you were injured? A. Yes, sir, he was down there.

Q. Was that before or after you called him? A. Which time?

Q. You said you called him concerning the need for extra help and the salt. [182] A. That was after that.

Q. Did he talk to you when he came down? Do you recall if you had a conversation about that when he came

down? A. We had a conversation that was about that time that barge broke loose and I had to have a leak and to get the wire put together for the one pump that was on the outside and we talked a few minutes there and went to get the leak and—

Q. But that was the only time you saw him that night? A. Yes, sir.

Mr. Libenson: I have nothing further.

Mr. Murdoch: I just have a few questions, Your Honor.

RECROSS EXAMINATION

By Mr. Murdoch:

Q. Just so I understand, you feel that as a headman you do not have authority to get extra help? A. No, sir.

Q. As a headman, do you have authority to get salt and use salt? A. If you have time, you have authority to get it.

Q. You stated you have a seventh grade education, is that correct? A. Yes, sir.

Q. Yet you read union contracts. Do you have any trouble understanding those? [183] A. Yes, I have a lot of trouble. A lot of times I can't pronounce the words then I have to look them up in the dictionary when I get time.

Q. Do you have a license to operate a tugboat? A. No, sir.

Q. Did you? A. No, sir.

Q. You never got the license? A. Yes, sir.

Q. Did you ever take the test for it? A. Yes, sir. Yes, I took it.

Q. Did you fail it? A. Yes, sir.

Q. The color blindness? A. Yes, sir.

Q. Did you take the written part? A. One time I took it.

Q. And did you have to study for that? A. Yes.

Q. Did you pass that? A. No, sir.

Q. You have talked about the jobs for the U.S. Post Office and for the township. A. Yes, sir.

Q. Did you actually take physicals for those jobs? [184] A. No, sir.

Q. You just knew that a physical was available but you didn't take one, is that correct, or was necessary I mean? A. I went and inquired into them and they said you have to have a physical and you have to be in good shape to pass them.

Q. You never took the physicals, is that correct? A. No, sir, I didn't.

Mr. Murdoch: That's all.

REDIRECT EXAMINATION

By Mr. Libenson:

Q. Why didn't you take the physical? A. They told me you've got to be in good shape and that's something you're not so I didn't go take them.

Mr. Libenson: I have nothing further.

The Court: Thank you, Mr. Pfeifer.

This would be a good time to take a break. We'll reconvene about twenty five to four.

(Court was thereupon recessed at 3:20 p.m. After the recess, the following proceedings were held commencing at 3:40 p.m.)

Mr. Libenson: Plaintiff calls Walter Tadder.

Transcript of Proceedings, October 29, 1980.

WALTER TADDER called as a witness by the plaintiff, first being duly sworn, [185] testified as follows:

DIRECT EXAMINATION

By Mr. Libenson:

Q. Please tell the Court your name and address. A. My name is Walter Tadder. I live at 1411 Kim Burma Avenue.

Q. Where's that? A. Up in Allentown, Beechview.

Q. How old are you, Walter? A. I'm 42.

Q. By whom are you employed? A. J & L.

Q. How long have you worked there? A. 12 years it will be now.

Q. In 1978, January 13th, 1978, where were you employed? A. J & L.

Q. Were you on the 12 to 8 shift the same one that Mr. Howard Pfeifer, the plaintiff in this case, was on? A. Yes, sir.

Q. What was your job duty that night? A. Take care of the hoist, keep the hoist running at all times.

Q. What was your classification? A. Me?

[186] Q. Yes. A. I was a landing helper.

Q. What does that mean? A. I take orders from Eddie Pfeifer, Howard Pfeifer. Whatever he wants me to do, I do.

Q. Had you worked as a landing helper before? A. Yes. I filled in extra. I'm originally a laborer I was. I did all kinds of jobs all over the belts. I worked up above the office, I worked the ground and the river.

Q. So you have no steady turn as a bargeman or landing helper? A. No. I filled in vacations, worked daylight 4 to 12, midnight wherever they needed me.

Q. That was in 1978? A. Right. I didn't have a bid job.

Q. Are you still with J & L? A. Yes.

Q. Do you have a bid job now? A. Yes, I do.

Q. What's your job now? A. Bargemen.

Q. But in January 1978 you didn't have that classification? A. No, I didn't.

Q. How did you know what kind of a job you were going [187] to do when you came to work? A. You stopped in the office, the foreman gives you a paper or call the lineup down to Eddie Pfeifer who picks up or he calls it down on the phone and we take it from there.

Q. Did this change from day to day? A. Line up, yes. Line up changes from day to day.

The Court: Did you say line up?

The Witness: Yes. It's to set the fleet up for the hoist, the barges.

By Mr. Libenson:

Q. You're the Walter Tadder that Mr. Pfeifer testified about that was working with him that evening, is that right? A. Yes, sir.

Q. Had you worked with Howard Pfeifer before? A. Yes, I worked a couple turns with him.

Q. What was his classification and what was yours on the previous times? A. Sometimes I was bargeman and he was landing helper. We worked together as a team.

Q. Did you have a third man with you that night? A. Yes, we did.

Q. What was his name? A. Hicks, or something like that, colored fellow.

Q. Had you ever worked with him before? [188] A. Couple times. He wasn't experienced on the river.

Q. How do you know that? A. Because the way we pull barges out he didn't understand.

Q. Did you know how long he had been on the river? A. No, I haven't.

Q. You say you had worked with him how many times before? A. Maybe two, three, four times. I always catch a different man sometimes.

Q. Is that because you were— A. I wasn't experienced myself that much.

Q. That evening when Howard told you to change a barge or whatever you had to be doing, what did you have to do with Mr. Hicks? A. I explained to him to take the cables out. I said, "Watch yourself. It's bad now. If you're going to fall in the river, let the cable go. We can dig it out; worry about yourself. Don't worry about the cables or anything like that. Let them go in the river."

Q. Did he tell you he was inexperienced? A. Yes, he told me. He was from the labor gang same as I was.

Q. The fact that he was inexperienced how did that affect your work that evening? [189] A. I had to watch him and then I asked Eddie to come out and help me pull some barge out.

Q. Who's Eddie? A. Eddie Pfeifer.

Q. You call him Eddie? A. Right. I asked him to give me some help because I had to break ratchets loose and that and I told Hicks to stay with the boat and face it up.

Q. What— A. It's easy. He could take the lines off and drop the—

Q. When you say boat, you're talking about the motor vessel? A. Right.

Q. As compared to a barge? A. Yes.

Q. Do you recall the evening of January 13th, 1978 when Mr. Howard Pfeifer was injured? A. Yes.

Q. Were you busy that night? A. Yes, sir, we was.

Q. Can you explain to the Court what you mean by busy as compared to not being busy? A. We had to keep the hoist set up. We had barges that we had to pull out of the fleet and put down in the lineup. [190] The hoist is No. 1 priority. You keep that hoist running at all times. That's No. 1. That's what we got orders from and they pulled barges, take them down to the hoist, secure them and go up and dig out more.

Q. Had any barges broken loose that evening? A. Yes, there was.

Q. Do you remember about what time that happened? A. Around 3, 3:30, somewhere close around there to my knowledge. Two of them bust loose and started flopping around and we already had one out. Me and Hicks going down the river.

Q. What do you mean bust loose and flopping around? A. The upper end of the line started going around.

Q. When you say line, is that the barge you're showing? A. No. The line holds it that you tie it with. It broke and the barges started to go out.

Q. What did you have to do then? A. I couldn't do nothing. I was on the barge going down with the other. Me and Hicks was on the boat so Eddie called the boat, he ran up and called the boat to give him a little assistance down at Landing 2 and they come up and pushed them in.

Q. That's a different boat? A. Right.

Q. Do you remember the name of the boat you were [191] working with? A. No. There's different boats that came in I worked with.

Q. Were these J & L boats? A. No, outside boats.

Q. But this outside boat is the one that was helping you and Hicks move the barges around. A. Right.

Q. And the boat that Eddie called or Howard called to get the loose barges was a different boat, is that right? A. Right.

Q. Was it a J & L boat? A. No. It was an outside boat too.

Q. Do you know the name of them? A. No, I don't pay any attention to them names while I'm working. I'm watching Hicks.

Q. Can you describe the weather condition that night? A. No. Bad. The lighting was bad.

Q. What was bad about the lighting? A. Because of snow and it was coming down pretty hard we only had lights from the cribbing. Maybe you could see three or four barges out and that's it. Beyond that you can't see nothing.

Q. From the shore? A. Right.

[192] Q. Have they changed the lighting? A. Yes, sir. We've got spotlights. You can see the other side of the river.

Q. But that lighting wasn't available at the time of the injury? A. No.

The Court: When you say walkway, what's that?

The Witness: The lights are up—It's a walkway. Lights are up on there on the stands.

By Mr. Libenson:

Q. Is the cribbing on land or on water? A. It sets on pillars.

Q. But it's directly next to the land? A. Yes, land and water in between both.

Q. And are the barges tied up to the cribbing? A. Some are, some ain't.

Q. Well—A. When we have two barges, it goes up in the hole. That's open at all times.

Q. Did you or Mr. Hicks shovel snow during the turn that Mr. Pfeifer was— A. No, no one ever told me that when I took that job, nobody.

Q. What I'm asking you during that turn did you shovel any snow off any gunnels? [193] A. No.

Q. Did you put any salt on any gunnels? A. Didn't have any salt.

Q. Was there any salt available? A. None at all that I know of.

Q. Did you during this turn become aware of this barge and you have been here during Mr. Pfeifer's testimony, is that right? A. Yes, I was.

Q. Did you become aware during this turn when he was injured that a particular barge was sinking? A. Yes.

Q. Do you know who noticed that? A. One of us do. Probably all of us. We were all walking up at that time.

Q. In other words, you say you changed the barge and you were walking up? A. Right, from the hoist coming upriver to the landing.

Q. Where would you be walking when you say walking up? A. In between two barges going up on the inside rail.

Q. Would this be on a gunnel? A. Yes, gunnels. There's two gunnels together and you walk up to the pump boat.

Q. The two gunnels form like a sidewalk? [194] A. Yes. Then there's a wee little opening sometimes.

Q. And you walked on those to get back, where, to the pump house? A. Right, to the pump house and that's when we spotted it.

Q. Did Mr. Pfeifer then tell you what to do? A. Yes. He went down. He had a flashlight. He's the only one that had a flashlight. We didn't have none. He looked. When he said we needed a pump, we knew what we had to do to save that barge before it sunk because we would answer for it.

Q. How low was the barge in the water? A. Pretty low. The lines was real tight.

Q. Did you notice the other barges on either side of it how high were they compared to— A. These was up pretty high.

Q. Can you give us— A. Not too high. Step down. I know I had to step down with the pump.

Q. How far did you have to step? A. Pretty good distance.

Q. Can you—A. Maybe five feet like that. It was a little drop off.

Q. You say you had to get—What part of the pump [195] did you get? A. I carried the leg, the long pipe on my shoulder. I picked it up and took it and I went.

Q. How big is that? A. Pretty big. I don't know how long or that. I don't measure.

Q. How much would you say it weighed? A. I don't have no idea.

Q. Was it heavy? A. It heavy? Yes.

Q. Can you carry more than one? A. You can carry one and that's all.

Q. Does it take two hands to carry? A. Right.

Q. How did you carry it? A. Hold it on my shoulder and start walking down.

Q. This is a metal pipe like? A. Yes.

Q. Can you describe it any better than that? A. It's a long tube and it has a topping where the motor slides into and then it has a propeller shaft on the back end with a screen.

Q. Where did you find the leg that you were using? A. I found it up about in between the third and fourth barge. It was setting there no motor on it. I pulled it out [196] and took it.

Q. It wasn't being used at the time? A. No, it wasn't. I took it down. I knew where it was.

Q. How did you know it was there where you found it? A. We looked around. We just scattered and started looking, that's all then I told Hicks to start looking for wiring in the barge pump house look around, see what we can get out.

Q. Where was the barge that you found this leg in compared to the barge that was sinking? How far away was it? A. It was a little bit past up by the end of the pump boat like about three barges, 3½.

Q. And you picked that up and how did you get it over to the— A. I picked it up and put it on my shoulder and started walking.

Q. You walked on gunnels of different barges? A. I was slipping a little bit myself and I slowed down.

Q. Did you notice where Mr. Hicks went to pick up the wire? A. No. He went around looking then he went in the pump boat. I seen him after that in the pump boat and I kept going down.

[197] Q. Who got to the sinking barge first? A. I did.

Q. Did Mr. Hicks get there shortly after you? A. Yes. He was starting to run the wire down.

Q. Did you notice where Mr. Pfeifer was? A. I seen him after I put the leg in the pump after I had hatch covered I dropped the leg in I was waiting for Ed so I could grab the motor and help put it on and I saw him coming down and he was coming—he had the box and a thing in his hand on the shoulder, a box, an electric box.

Q. Electric box in his— A. In his hand and the motor on his shoulder.

Q. Do you know how much this motor weighs? A. No, I don't.

Q. Is it about as heavy as the pipe? A. Maybe a little heavier.

Q. When we say pipe, I mean the thing that you carried. A. The leg.

Q. About the same weight or a little heavier? A. Maybe a little heavier because it's longer and awkward. It can tilt on you. If you don't catch it, it can flop backward on you.

Q. Did he come back to the sinking barge in a different direction or use a different path than you did? A. Yes. I came straight down from the pump boat. I [198] came straight down.

Q. You came from a barge. You didn't come from the pump boat? A. I was up. I had to get the pump boat—

Q. Did you see him fall? A. Yes. I was waiting for him waiting to get the motor from dropping in.

Q. What happened? A. I seen his feet go up. He went down and I seen his hat fly off. I didn't know where the motor went. I don't know whether it went in the river or in the barge and I waited and he got up.

Q. How long was he down before you saw him get up? A. Maybe two, three minutes like a shot then he got up. He picked himself up and he come right up.

Q. Did you notice what he slid on? A. It was metal, an iron barge with snow on.

Q. Did you walk over there after he fell and looked at it? A. No, I didn't look. I was worried about getting the barge pumped out, get the motor running so it wouldn't sink.

Q. Did he say anything to you about— A. He didn't say he hurt or anything or nothing. I said, "You all right?" He shook. He didn't say too much. He [199] hold the flashlight for me while I rigged it up.

Q. Did you have to pick the motor up? A. Yes, I took it off him and started putting it on and he held the flashlight.

Q. Where was Hicks? A. Hicks was alongside with me with the wire ready to plug in.

Q. Did you get the pump going? A. Yes.

Q. Did the barge sink? A. No. If we didn't put that pump in, it would have sunk.

Q. Did he do anymore lifting or carrying after he fell, Pfeifer? A. No. He went in and did his work, paperwork he had to.

Q. What were you doing, you and Hicks? A. Moving barges, keep the hoist going, No. 1.

Q. Did you have any conversations with Sherman Haddix that night? A. He come down after we got the motor running and the pump he seen it was low. The barge was real low. He seen it. He was down there.

Q. You didn't talk to him at all, did you? A. No. I went on about my business.

[200] Q. Did you shower up with Mr. Pfeifer when the shift was over? A. No. He showers up in the pump boat. He changes down—

Q. Were you there when he changed? A. Yes, when he took his shirt off.

Q. What did you see? A. I seen his back was swelled and all red. I said, "Ed, you'd better go up to the dispensary and have yourself checked before you go home?"

Q. When you say swelled and red, where was it red? A. Yes, down the bottom here, red.

Q. Just above the— A. Whatever they call it.

Q. The coccyx? A. He was going to take a shower and I seen and I said, "You'd better go up."

Q. Prior to his injury, you say you had worked with him before? A. Yes, I did.

Q. On a good number of occasions? A. Yes, I did.

Q. Did he have the ability to do the job? A. Yes, he did. He carried pumps, carried legs just like me or anybody else. He carried his own weight.

[201] Q. Was he strong enough to do all the jobs? A. Yes, he did, climbed down inside the barges and plug.

Q. He would climb— A. There's a ladder you climb down and you plug the barges. He was down there with us where the water was coming in.

Q. Does that take a certaim amount of agility? A. It was two men: one holds the flashlight and one starts plugging. He knows more about plugging than I do. He's experienced and I'm not.

Q. Was there any other way that he could have— route that he could have taken to have gotten that motor over to the sinking barge? A. I don't know from there. I was out a little farther. Probably not. He used the best route he could.

Q. You didn't know of any other mode of getting that motor to that barge, do you? A. No.

Q. Since his accident, has J & L used a different type of pump? A. Yes. We've got smaller ones now, electric, with a hose and everything in; just drop it in by the hose and plug it in and it's on; don't have to connect it up or anything.

Q. Is it lighter? [202] A. Lighter. One man can carry it.

Q. They didn't have those the day he was injured? A. No, we didn't, didn't have these at all.

Mr. Libenson: Cross examine.

CROSS EXAMINATION

By Mr. Murdoch:

Q. Mr. Tadder, you stated you have been employed for 12 years by Jones & Laughlin. A. Yes.

Q. How many years as landing helper? A. Off and on I worked the belt, I worked everything. I was under Warren in the labor gang.

Q. You mean Warren McCullough? A. Yes.

Q. For what period of time as of January 1978 had you been working at least some portion of your time on the river as landing helper, bargeman? A. Belts and everything. I knew the whole outfit.

Q. Would it be true you might have started working as far back as your first year at Jones & Laughlin working— A. First day I started, no.

Q. First year, I'm sorry. A. No. I was working for Mr. Charles, a colored foreman. I was loading sulphade and that man knows it right there, Warren McCullough.

[203] Q. My line of questioning is just trying to find out when, what year you would have started having

some experience working on the barges at Landing No. 1. A. I loaded coke first.

Q. What year? A. I don't know the year. I didn't pay no attention. I did all the jobs they told me.

Q. Is it fair to say you've been working at Landing No. 1 on and off for some period anyhow? A. Maybe one or two years, yes, maybe whatever you want to say you say but I know all the jobs. I can do any job up there and run it and the foreman knows it.

The Court: Just try to answer the questions.

The Witness: All right.

By Mr. Murdoch:

Q. I don't want to say anything. I'm just trying to find out.

You stated you have been working as of the date of the accident. A. Right.

Q. Which was January 13th, 1978 you were working as a landing helper.

Mr. Libenson: I think that's a misstatement.

Mr. Murdoch: All right. Correct it.

A. Landing helper. He was my boss. He was headman. [204] I'm landing helper.

The Court: You're indicating Mr. Pfeifer?

The Witness: Pfeifer was my boss.

Mr. Libenson: I don't mean— I guess I will interject. I think the distinction, Your Honor, between a bid job and a helper, and I don't mean to try to restrain the cross examination, but my question that I thought I developed was that he did not have a bid job which means the same job

on a continuing basis until after this accident and prior to that he was a helper and had many jobs.

The Witness: Right.

Mr. Murdoch: I think as Your Honor knows, I'm just trying to find out when he started to get the experience on the river.

Mr. Libenson: That's different.

Mr. Murdoch: That's what I've tried to get at three different ways.

By Mr. Murdoch:

Q. You were working January 13th, 1978 as a landing helper? A. Right.

Q. Had you worked in that job capacity before January 13th, 1978 as a landing helper? A. '78? I think I was bargeman. When we didn't have a boat, I worked up where the oiler was. We didn't have a [205] boat. That's where I started barge helper.

Q. In reference to the accident, would it be one year, five years? A. I don't know, but I filled in there on vacations. I worked there one week and the next week I'm on the belts.

Q. You indicated this was a busy night, is that correct? A. Right, and I had an unexperienced man down there.

Q. And your job I believe you stated was to keep the hoist set up. A. No. 1, right. You don't shut that down. They tell you you keep that going.

Q. Is that true even though you may be using coal from other sources up in the mill? A. If the hoist is shut down, then that's different then you have other work to do. You pull barges, you check and everything else.

Q. Who determines when the hoist is going to be shut down? A. I don't know. Foreman has that, not me.

Q. Would that be someone like Sherman Haddix? A. Right, up the office. I don't have nothing to do with that. All I do is supply it with coal, keep it going.

The Court: Excuse me. When you say hoist—

The Witness: The hoist that empties the barges.

[206] By Mr. Murdoch:

Q. You would have orders for barges to be put under the hoist, is that right? A. Outside the hoist. If there's a barge under the hoist, we line them up to go under the hoist.

Q. And Mr. Pfeifer would have been responsible for having those orders available and either directing you and Mr. Hicks or working with you to line these barges up, is that correct? A. Right. I asked him for assistance because Hicks did not know how we moved barges. We could pull two end on end and one man will break the chain and the barge will go down and the—

Q. When you say this is a busy night, Mr. Tadder, was this because you were trying to speed up the elevator and get more coal up? A. I don't know what they do. They speed the elevator up. They have notches that they set the lever on. Not me. They can set that on three notches, I think four notches.

Q. I understand that. You would not have anything to do with what speed that was operated at. A. No, I don't know nothing—

Q. When you said this was a busy night, was at least a portion of the reason as to why this was busy because they were speeding the hoist up, speeding the elevator up? [207] A. I don't know why.

Q. You used the term busy. I'm just trying to find out. A. You could do seven, eight barges a day.

Q. What is normal for a typical 12 to 8 shift as far as the number of barges you would unload? A. You mean on midnight?

Q. Yes, sir. A. Sometimes eight, nine barges if we're busy.

Q. Well, is eight or nine barges a busy night? A. That's part loads and empties. That's all combined.

Q. Well, let me try to get at it this way. If you have a normal night as opposed to a busy night— A. Nothing breaks down.

Q. —on a 12 to 8 shift, how many barges would you normally unload? A. Eight or nine.

Q. If you have a busy night on the same type of thing— A. Same thing?

Q. —what distinguishes then a normal night from a busy night? A. Both the same. They're busy. You keep going. You need the coal up the ovens. You keep sending it.

[208] Q. On a normal night, you don't spend any time loafing. A. Try to keep busy, check our fleet, keep everything in order and I have this man I'm watching.

Q. Can you tell me why January 13th, 1978 midnight to 8 a.m. shift was busier than any other 12 to 8? A. I get the lineup. He gets the lineup. He tells me I need this barge, this barge, this barge. He comes out and helps me. We pull one at a time and then we fill in the holes again.

Q. Did you unload more coal barges on this particular night than before? A. I don't know. I don't keep track. I don't count tonnage. I put barges out.

Q. Why did this seem to be a busier night than any other night? A. Because everything was inside. We had to figure out and I had an unexperienced man. He wasn't experienced with the moves we made. We had hang barges on one or two lines get in the middle and pull them out and then we'd have to close that back up or we lose anymore barges going down the river or break loose. This man didn't know nothing about these moves. We explained them. That's why we kept him on the boat to face the boat up.

Q. Are you aware of any other persons that were [209] working that 12 to 8 shift other than Mr. Hicks, Mr. Pfeifer and yourself who might have been available to come down and help move barges? A. Foreman could have come down. When there was a man that's not experienced, they usually come down and show them sometimes or they'll stand on the cribbing. They won't go on the barge and they'll tell a man you do it this way. That's wrong. That foreman should get a life jacket and come down on that barge because I seen it done already.

Q. Do you recall Mr. Haddix being down at all that time? A. Yes, when the barge was sinking, we showed him. We said, "Look, you want to lose it then you answer up the office, not me because it costs money to dig that barge out and you've got to get an outside contractor and everything to come in and we have to answer for it, not Haddix. We do."

Q. Did Mr. Haddix come down at any time to help put pumps in any barges? A. No. That ain't his job. He has other things to take care of.

Q. Such as— A. The belts and everything else, running around.

Q. So actually he has responsibility for a wide range of duties and a large square area, is that right? A. Right. He travels.

[210] Q. Was there anybody other than Mr. Haddix who might have been available during that 12 to 8 shift to come down? A. Not that I know in the office. I'm down working in the river. My job is staying down on the river.

Q. You indicated the lighting is not good, is that correct? A. Yes.

Q. Did you state that you could see three to four barges out? A. About the third barge out then maybe we had two or three more out with it. Now you could see the other side of the river because we've got spotlights up.

Q. Mr. Haddix has testified that the leading—

Mr. Libenson: Mr. Haddix hasn't testified.

Mr. Murdoch: Mr. Pfeifer. I sorry.

By Mr. Murdoch:

Q. Mr. Pfeifer has testified that Barge 1384 was in the third row of barges out. Is that how you would call it? A. I think so. I ain't sure. It was snowing and that and everything and I was watching myself. I'm not going to—I ain't going to take a dive in the river.

Q. You don't know if that's accurate then. A. I can't tell you that because I ain't familiar with all the setup the barges like he is. He knows what's going on.

Q. Let's assume that Mr. Pfeifer is accurate that it [211] was in the third row out. Is that in an area where this light is sufficient to shine on there? A. Why don't you come down and look around tonight when the lights are on? You represent J & L.

The Court: Sir, just answer the questions.

A. Maybe there is. If the coal is over top of it, then you can't sit down and you have a barge sitting—

By Mr. Murdoch:

Q. Do you know whether or not it was visible with the light on that day, Mr. Tadder? A. I can't say. Maybe it was, maybe it wasn't.

Q. Were you aware—Strike that.

As of January 13th, 1978, who did you feel had responsibility for making sure that there was salt available at Landing No. 1? A. That's the foreman's job to order it. If the man would call, he could have had it ordered. If we had time, maybe I could have went up but I didn't have time. I had barges sinking and that's a priority. That's No. 1.

Q. You had barges or barge? A. Barge. That one barge then I had to keep the hoist running at all times.

Q. Did you have any knowledge or did anybody ever tell you that the headman had any responsibility for ordering salt? [212] A. No, nobody told me nothing about that.

Q. Did you have any knowledge or understanding that you as a landing helper on that particular turn would have responsibility for salting the gunnels of the barges? A. No, nobody ever told me that.

Q. When did you become aware that there was no salt available? A. When Mr. Pfeifer called.

Q. Were you at the time he called in the pump— A. No. We walked up and we didn't see nothing outside the landing where they keep it in the corner. There's always buckets there, five gallon buckets. That's what he told me and there was empty buckets there.

Q. When you first saw the barge that was leaking, do you recall what number that was? A. No, I don't. I don't look for numbers. I'm worrying about pumping and getting it back up.

Q. Do you know if it was empty or loaded? A. It was a full load I know that because it was moving fast.

Q. Were there any pumps in any of the hatch covers either on the gunnels or the deckends of that barge? A. Yes, one. The one wasn't keeping it up so we had to put another one up in there and it brought it up. There must have been a pretty good hold in there because the first [213] ladder running the water was up.

Q. You're talking about inside the bulkhead? A. Right. We put that pump in and it started catching it.

Q. Where was the pump that was in that barge at the time you noticed it was leaking? A. The pump that we went and got?

Q. I'm sorry. Maybe I misunderstood you. Before you got the pump, was there already a pump in one of those hatch covers on that barge? A. Yes, up above but it wasn't keeping up with the water flowing in.

Q. I understand. A. Water must have been coming in pretty fast then we put another pump in.

Q. You stated the barge was "real low". What do you mean by that? A. Out of the water. I don't know how many inches or anything.

Q. Did you observe it? A. Yes, I was on it.

Q. I mean— A. Haddix was on it. We brought him down and said, "Look what we've got."

Q. You observed it was low in the water? [214] A. The lines were so tight it may have broke and it would have went down.

Q. Lines are we talking about— A. The lines that hold the barges together.

Q. That would be from the timberhead on the quarterhead to the— A. Right, and they was tight.

Q. Was there any snow on the gunnel of 1384? A. What time was this, after midnight?

Q. Whenever you were on it. A. Yes, it was snowing when I was out.

Q. My question was was there snow on the gunnel, on the deck? A. Yes, snow on both.

Q. And is it normal that you when you're working as a landing man or a headman would work under those conditions, snow conditions? A. Yes. We work in all kinds of weather, lightening storm, you go out there and change the barge. Even if lightening hits the barge, you stay there I guess.

Q. What type of pump are we talking about that was in the gunnel of 1384 at the time you observed it? A. The same kind we put in, a leg with a motor on a breaking box.

Q. Was there any term that you would use to describe [215] that pump back in January 13th of 1978, any name that you would call it? A. Leg and a motor, that's all we called it.

Q. Were you familiar with an AC pump or a DC pump? A. No. I don't know nothing like that. I just picked the motors up.

Q. Are you familiar with gasoline pumps at all? A. Yes. We use some of them. They break. You pull the boat—

Q. Do you have any idea as to what type of pump and how many were available on Landing No. 1 on January 13th, 1978? A. No.

Q. Can one man even though he might have to make more than one trip use that type of pump and put it together and make it work without help? A. A leg?

Q. The entire pump. A. It would take him time, yes, but he'd have to move slow and he'd have to look around.

Q. I wanted to clarify one thing and I didn't know if it was only me who who was confused or not but you indicated you were carrying the pump leg. A. A stem. That's a long piece of pipe.

Q. You made a comment that when you were answering a [216] question regarding what Mr. Tadder was calling that you would have to make sure this would go back. A. Set in the middle hold it balanced right.

Q. Were you referring to the pump leg you were carrying? A. Right.

Q. You were not referring to what Mr. Pfeifer— A. No. This is awkward. This is real big, big as an old clothes prop looked like.

Q. Are you familiar with the fact in January 1978 there were different size pumps of that type as far as the length of the leg? A. Legs?

Q. Yes, sir. A. Yes, I knew they were different. They were longer and shorter.

Q. And heavier and lighter? A. We had the heavier pipes.

Q. Is it your testimony as of January 13th, 1978 you only had one length pump leg at Landing— A. That's what I found up there and wasn't being used so I took that one out and brought it down.

Q. That's what you found. My question, Mr. Tadder, was whether or not you had knowledge as of that particular date that that was the only length pump leg that

was available [217] at Landing No. 1. A. No, I don't know, see. A lot of them get shipped out and get repaired if the stems break off. There's only a wee little stem on there and if they break off, you can't use them.

Q. Were you present at the time that Mr. Pfeifer would have reported this happening to Mr. Haddix?

Mr. Libenson: What happening?
Mr. Murdoch: The accident.

A. Reported it, no. He was on his own up the office. My job is still moving. I have to keep the hoist moving.

Q. So you were not in at that time. A. No. He goes by himself with the mail. We stay and our job. We keep the operation going.

Q. You indicated you saw Mr. Pfeifer's back and it was red. A. In the shower room where he changes down there on the river.

Q. How low—I really couldn't tell— A. Down in here past the belt.

Q. Would it be below the belt level? A. Down a little bit. I seen it was red and swelling and I told him to go up and have it checked. Any fall they tell you to report to play safe and that's what the man did.

Q. You don't have any idea as to the name of the [218] motor vessel? A. No. We have different boats working for us. We have boats coming in and out.

Q. Were you aware that a request had been made for extra help by Mr. Pfeifer? A. Yes, he told us.

Q. Had you had any experience working in similar weather, Mr. Tadder? A. Yes, rain, slippery and rain. I almost took a dive in the rain on a lump of coal.

Q. And that's a hazard. A. You have to watch the way you walk. You could trip over a rachet in front of

you and you don't know if it's there. The snow covers it. You're lost. You've just got to play it safe.

Q. Would you walk by almost shuffling your feet as opposed to a normal walking? A. I walk slow and I watch them hatch covers because they're covered somctimes and you go down through them and you're done. You have to watch. You have to take it slow.

Q. Barge No. 1011 are you familiar or do you have a recollection of your own that that was the barge number on which Mr. Pfeifer fell? A. No, I didn't know what number.

Q. Do you know whether or not on which he fell was a [219] standard or jumbo size? A. No, I don't know that. Just worrying about getting the pump in and getting the barge before we lose it.

Q. Was the leaker standard or jumbo do you know? A. I don't know. I don't pay no attention. I'm worried about the barge sinking, get it up and get it out. I don't want to be there sitting there all night.

Q. Was there a duckpond between the barge in which Mr. Pfeifer fell and the leaker? A. The leaker there was a duckpond, yes, because I had to watch it when I came. I know that. You had to watch it. I had to watch I don't fall back in when I was putting the pipe.

Q. Was that barge on which Mr. Pfeifer fell higher than any of the other barges that were parallel to it on either side? A. You mean the leaker?

Q. No, sir, the barge on which he fell there were barges on either side of that barge? A. That I didn't see. I was on the leaker and it was down low and I seen them from the—him from the corner down there coming down. I can't tell you on the other side if it was high or low. I can't tell you.

Mr. Murdoch: That's all I have, Your Honor.

[220] REDIRECT EXAMINATION

By Mr. Libenson:

Q. Since you've been working at J & L, have they ever cancelled the ship because of bad weather? A. No. They don't shut down for no weather at all.

Q. These new pumps that you said one man can handle now that they have now how many of them do they have?

Mr. Murdoch: Objection, Your Honor. I don't think that's relevant to anything involved in this particular incident.

The Court: I think that's correct. We'll sustain the objection.

Mr. Libenson: May I just make a small argument as to why I think it's relevant?

The Court: Sure.

Mr. Libenson: It's relevant to show that more and better equipment is now being used and could have been used at that time and one of the allegations of our Complaint is they didn't have adequate equipment available for the type of work they were asking these people to perform.

The Court: As I recall, post tort improvements are generally inadmissible in a tort claim case.

Mr. Libenson: They are to show negligence but if you can show state of the art and so forth and what could have been available, I think it would be admissible.

[221] The Court: I'm going to sustain the objection.

Mr. Libenson: All right.

By Mr. Libenson:

Q. How long after you had inserted this second pump in this sinking barge did it—What was the term you used? A. Start to rise.

Q. How long after? A. Maybe a half hour.

Q. Did Mr. Pfeifer do any other work that evening? A. Just paperwork. Stayed in. I went out and I told him, "Stay in. I'll do your work and I took his flashlight and I went out.

Mr. Libenson: I have nothing further.

Mr. Murdoch: I have nothing, Your Honor.

The Court: Thank you, Mr. Tadder.

The Witness: You're welcome.

(Witness excused.)

Mr. Libenson: If Your Honor please, I have no more witnesses. I don't know if you want to be heard at this time—let me be heard at this point or not. I just wanted to ask the Court if I could read my calculations from my supplemental pretrial statement into the record to show what our claims of lost earnings and future lost earnings are. I think that the documents supporting the material in the supplemental pretrial statement are now in evidence. I haven't read them in detail [222] but that would be the item I wanted the Court to—I want to have in the record.

The Court: Any problem with that, Mr. Murdoch?

Mr. Murdoch: Yes, Your Honor. I don't think they're entitled to show a loss of future earnings on the basis that there's no testimony that this man is permanently disabled. I think they're en-

titled to show some impairment of lost earnings but I don't think it's a guideline. I think they have the burden of coming in and establishing what he might be able to make and, therefore, I don't think it's relevant in this case.

Mr. Libenson: I disagree with Mr. Murdoch. I think it's his burden if he wants to show that there's employment available in mitigation to show that. Furthermore, I think the witness did testify of his attempts to secure other employment and he was unsuccessful.

The Court: I think at this point the case is in a posture where he can introduce the lost earnings so we'll overrule the objection and permit counsel to introduce those.

Mr. Libenson: All right.

Mr. Murdoch: May I just make one statement at this time, Your Honor? I still have an objection outstanding which may bear upon Mr. Libenson's figures based upon a review of his figures by somebody.

The Court: This is on Exhibit 7?

[223] Mr. Murdoch: Yes, and I think that would have some bearing at this point and time.

Mr. Libenson: To the extent that there's a variation in the contractual rates which I'm not aware of and which he had the availability and the possibility of being able to prove—

The Court: I had understood there was a chance of getting the thing stipulated after the man from the company looked it over. Did you misunderstand?

Mr. Murdoch: No.

The Court: He'll be here tomorrow.

Mr. Murdoch: Yes.

The Court: He won't be—It won't take very long?

Mr. Murdoch: No.

The Court: Why don't we wait until in the morning because otherwise we'll be cluttering up the record. I'm told for a change 9 o'clock I don't have anything.

(There was an off the record discussion regarding scheduling.)

Mr. Murdoch: Dr. Enriquez who has been subpoenaed to come into court refused to come into court. He felt it wasn't adequate notice for him to come so I may ask the Court to allow at the conclusion of the testimony and I'll try to find out tonight or have one of my associates find out tomorrow [224] whether or not he would be available for a deposition for use at trial within the next few days to supplement the testimony.

The Court: It being non-jury, I don't see any problem with that.

Mr. Murdoch: Then I will have a motion. I don't know if you want me to make it now—

The Court: Why don't you go ahead?

Mr. Murdoch: At this time, Your Honor, I'd make a motion for a directed verdict on behalf of the defendant for several reasons: First of all, I will renew the position which we took which we filed in the answer to the Complaint which we raised for summary judgment that in an action under 905(b) of the Longshoremen's and Harbor-

worker's Act is not proper where the owner of the vessel, and it has been established that the owner of the vessel is in fact Jones & Laughlin, is the employer of the plaintiff. In all due respect to the Griffith decision, I think there has been again a decision from the Eastern District Court which substantiated my position that 905(b) would be proper where the owner of the vessel is a third party and not an employer of the plaintiff. Essentially what we're doing by allowing the action under 905(b) where it is the employer is that we are diluting in effect that 905—any effect that 905 has and I would like to state that 905(a) basically states that the payment of Longshoremen and Harborworkers' compensation as long as it is [225] being paid is the exclusive remedy which the employee has and the testimony shows that we have paid and are paying at the present time the required compensation under the Longshoremen's and Harborworker's Act.

The Court: Isn't that controlled now by—And I can't remember the other case—

Mr. Libenson: Griffith against the Wheeling Pittsburgh Steel, Your Honor, and I think there's a case Duncan against Dravo.

Mr. Murdoch: There were briefs filed on that point both by the plaintiff and the defendant.

Mr. Libenson: This is a repetition of the briefs.

The Court: I understand that he's preserving it.

Mr. Libenson: And I think Judge Weber's opinion also in the Anderson case.

Mr. Murdoch: I don't know if I necessarily raised at that time that payments are still being made which I think distinguishes it from the Anderson case which Mr. Libenson—

Mr. Libenson: The Anderson case was a Jones Act case so it's definitely not the same.

The Court: Just for ease in reference as far as the record is concerned, the citation of his Griffith against Wheeling Pittsburgh Steel Corp., is 521 Fed. 2d 31 and the reference I have here is Pages 40 to 44 1975 cert. denied 423 1054.

[226] Mr. Libenson: 16 Fed. 2d, Your Honor?

Mr. Murdoch: There were three different published decisions on the Griffith case. 578 sticks in my mind. I don't know which is correct but as I say, I don't know and I don't think I did raise at the time the motion for summary judgment the basis that we were continuing to make the payment of compensation and lastly, I would make a motion for directed verdict that I don't think there's been any showing of negligence on the part of Jones & Laughlin. I think the evidence through the plaintiff's own testimony is that he had the responsibility to go out and get salt and make sure it was there and this is common law negligence as opposed to negligence that we have in the Jones Act where it's only necessary to show that the action of the employer caused in part the condition which the plaintiff is complaining of so I would make separate motions for directed verdict on the basis that there's failure to show that there was in fact negligence against Jones & Laughlin.

Transcript of Proceedings, October 30, 1980.

The Court: We're satisfied that there is sufficient evidence before us at this point to support the claim so we'll deny both motions.

Mr. Murdoch: Okay. Thank you.

Mr. Libenson: We'll see you at 9 o'clock?

The Court: 9 o'clock.

Mr. Libenson: Thank you, Your Honor.

(Court was thereupon recessed at 4:35 p.m.)

Transcript of Proceedings October 30, 1980

* * *

[227] (The following proceedings were held commencing at 9:15 a.m., Thursday, October 30, 1980.)

The Court: Good morning.

Mr. Murdoch: Good morning, Your Honor.

Mr. Libenson: Good morning, Your Honor.

The Court: Did you fellows get together on the wage scale?

Mr. Murdoch: No, Your Honor. That particular witness was not coming until today.

Mr. Libenson: I didn't know that. I was ready. Can I keep my end of the case open until then?

Mr. Murdoch: Yes. I certainly agree to that.

The Court: You rest except for that?

Mr. Libenson: I would like to do two things. On the Exhibit 1, I just would like to read—excuse me—Exhibit 2, Your Honor, I would just like to read the precipitation in inches on January 13th, 1978 from this exhibit shows that between 12 and 1 it was traces and 12 and 2 it was traces and 2 to 3 it was 0200 inches and 3 to 4 it was .03 inches and 4 to 5 was .03 inches and 5 to 6 was .02 inches and 6 to 7 was .02 inches and there is a summary on the same exhibit that the 24 hour maximum

temperature was 33 and minimum temperature 22; that the 24 hour precipitation and water equivalent was .16 in inches. 24 hour snowfall is 1.4 [228] inches and the snow depth was 3 inches.

The Court: Are you reading from the second page?

Mr. Libenson: From the last page, Your Honor, which would be the 13th and down at this block portion down here they have summaries which I think I want to bring to the Court's attention.

The Court: It says—The thing I'm looking at says maximum 33 temperature low.

Mr. Libenson: Minimum 22.

The Court: And then 24 hour precip. Is water equivalent .16?

Mr. Libenson: Yes, sir.

The Court: 24 snowfall until something 1.4 then snow depth 3 inches. All right. I understand.

Mr. Libenson: And also on the life tables, the work expectancy for a 55 year old male is 11 years.

The Court: On mine, yes, yes, 11.0.

Mr. Libenson: That's correct and he did testify that he is 55 and the retirement age is 65. I assume the work expectancy is calculated from the trial date forward rather than from the date of injury because we have a claim for lost earnings up to the time of trial.

The Court: You should make a note of that in your proposed findings of fact and conclusions of law.

Mr. Libenson: Thank you.

* * *

[293] * * *

DAVID CURRAN called as a witness by the defendant, first being duly sworn, testified as follows:

Mr. Libenson: Before the witness starts, Ild like to put on the record a motion to strike Dr. ElAttar's testimony.

The Court: That will be denied.

[294] DIRECT EXAMINATION

By Mr. Murdoch:

Q. State your name, please. A. David Curran.

Q. Where do you reside, Mr. Curran? A. 1101 Prospect Road, Pittsburgh 29.

Q. Are you married, sir? A. Yes, sir.

Q. Do you have any children? A. Four.

Q. By whom are you presently employed? A. J & L Steel.

Q. Can you tell me what your occupation is today? A. I'm a battery foreman.

The Court: Sir?

By Mr. Murdoch:

Q. What is a battery foreman? A. You work at the coke oven keeping things operating at the yard and screening stations.

Q. This is with Jones & Laughlin? A. Yes, sir.

Q. How long have you been employed totally by Jones & Laughlin? A. 24 years.

Q. Can you tell me the various capacities or jobs that [295] you have held in these 24 years? A. I started as a laborer in 1956 then I worked all the jobs at the Coal Handling Department up through '65.

Q. Would that include barge helper, landing man? A. Every occupation in the department.

Q. Can you keep your voice up, please? A. Every occupation in the department.

Q. All right, sir. A. In '65 I became a shipping clerk and in '71, I went back to the Coal Handling as a foreman.

Q. What type of foreman or are there different types of foremen? A. Landing forman.

Q. How long did you hold that job? A. Until 1978, the end of January.

Q. End of January. What did you do—What job did you take on at that time? A. Then I went up to the ovens.

Q. As the battery—A. Yes, sir.

Q. On January 13th, 1978, you would have been the landing foreman? A. Yes, sir.

Q. And is that Landing No. 1 where Mr. Pfeifer was employed? [296] A. Yes, sir.

Q. Can you tell me as of January 1978 what your duties were as the landing foreman? A. I was working in both as a landing foreman and general foreman doing all the scheduling. We did work on the second turn unloading.

Q. What do you mean by second turn? A. Daylight. Unloading railroad cars into barges, sometimes receiving trucks of coal in through the system, things like that.

Q. What responsibility if any did you have for link up, adequate personnel to fill the various positions at Landing No. 1? A. I did all the scheduling.

Q. Did you in fact have any type of responsibility as far as determining what equipment should be available at the landing? By equipment, I'm talking now let's talk

about pumps and shovels, nylon lines, whatever type of lines would have to be used as far as movement of barges. A. Yes, sir.

Q. That was your responsibility? A. Yes, sir.

Q. What about salt, shovels in case of snow? A. We always had salt in the department.

Q. Was that part of your responsibility to make sure [297] that at least it was ordered by wherever it came into the plant? A. I had ordered the salt in maybe once a week a bucketfull, a bucket being three cubic yards.

Q. Were you working on January 13th, 1978? A. On the second turn, yes, sir.

Q. At that time—

Mr. Libenson: What is the second turn?

The Witness: 8 to 4.

The Court: Second turn is 8—

The Witness: 8 to 4. 8 a.m. to 4 p.m.

By Mr. Murdoch:

Q. Your first turn would start as midnight which would coincide with the calendar date? A. Yes.

Q. On that particular day—

The Court: In think you said January 13th. Is that what you meant or did you mean January 12th? The accident happened shortly after.

Mr. Murdoch: You're correct, Your Honor.

By Mr. Murdoch:

Q. Did you work the 12th also? A. Yes, sir.

Q. In your capacity as foreman, would you work the second turn all the time back in January 1978? [298] A. Yes, sir.

Q. Were there any harborboats owned by Jones & Laughlin that were used in the movement of barges in January of 1978? A. Any harborboats?

Q. Owned by Jones & Laughlin? A. No.

Q. At one point in time, had there been a harborboat? A. Yes, sir.

Q. And what was the name of that? A. The MV Hazelwood.

Q. When did that go out of service as far as being in use at Landing No. 1? A. I believe in October but I'm not sure of 1977.

Q. Did Jones & Laughlin do anything after the motor vessel Hazelwood went out of service to have any motor vessels available at Landing No. 1 after that? A. Yes, sir. We hired the Sidney Johnson from the Pittsburgh Scrap Company to service No. 1 landing.

Q. Do you know, do you have personal knowledge as to whether or not that vessel was present and in use on January 12th and January 13th of 1978? A. Yes, sir, she was.

The Court: Did you say the name of the boat was the Sidney F. Johnstown?

[299] The Witness: Sidney Johnson.

By Mr. Murdoch:

Q. And do you know who the owner of that motor vessel was? A. It came from Pittsburgh Scrap. I don't know whose name would be on the title.

Q. On January 12th and 13th, do you have personal knowledge as to whether or not there was a crew that came with that vessel? A. Yes, sir. There would be a pilot and two deckhands.

Q. What would the purpose of the two deckhands be? A. The landing man, the headman would go out and when he watched barges, he'd give the list of barges he wanted to them and showed them to him and he'd go out and deliver it for him, deliver it to the coal hoist.

Q. How would you classify the two men that were on the Sidney Johnson in addition to the operator? Would they be deckhands, landing men or— A. On the river they'd be called deckhands.

Q. Who would have control on the 12 to 8 shift on January 13th, 1978 over the use of that motor vessel? A. The headman at the landing.

Mr. Libenson: Objection. He wasn't there.

Mr. Murdoch: I'm asking as a matter of policy, Your Honor.

[300] The Court: All right. He can answer the question.

A. The headman at the landing.

The Court: Excuse me. When you say the headman at the landing, that's the foreman?

The Witness: No, the landing tender.

By Mr. Murdoch:

Q. When we talk about the headman, would that be the position that Mr. Pfeifer testified that he was working on January 13th? A. Yes, Sir.

Q. As distinguished from Sherman Haddix or some other foreman? A. Yes, sir.

The Court: And the headman would be the one who would control what the Sidney Johnson did, is that what you're saying?

The Witness: Yes, sir.

By Mr. Murdock:

Q. Would he control the crew of the Sidney Jonson? A. Generally he'd speak to the captain and the captain would then control the crew.

Q. And what use again as a matter of general policy would the crew be used for? A. Untying lines, facing the boat up on the barges.

Q. Is this the same type of work that the headman and [301] landing man might do? A. yes, sir.

Q. Again speaking of company policy as of January 13th, 1978, who would have the responsibility on the 12 to 8 shift to determine and make sure that there would be salt available in case of bad weather? A. There was salt available in the department but as far as salt on the landing, we never sent it down there.

Q. Who has the responsibility at the landing though on the 12 to 8 shift to make sure salt is there? A. The headman would get the salt if he needed it.

Q. Would he necessarily have to go to his foreman to request it to get it himself? A. If he wanted the salt, he'd send one of his two men with him.

The Court: I didn't hear—If he wanted salt, what?

The Witness: If he wanted the salt, he has two men under his direction. He could send either of those or go get it himself.

By Mr. Murdoch:

Q. Could he make use of any of the crewmembers of the motor vessel Sidney Johnson to go get salt? A. No, sir. I don't think they should be sent up into the plant.

[302] Q. Could he make use of the crewmembers of the Sidney Johnson while one of his men went to get salt? A. Yes.

Mr. Libenson: Objection, Your Honor. He's getting into a particular situation where this man was not present and I don't think he can answer that.

Mr. Murdoch: I'm getting into a position again of what duties the headman could do and make use of as a general policy.

The Court: We'll permit the answer; overrule the objection.

By Mr. Murdoch:

Q. What was your answer again? A. What was the question?

Q. Could the headman, could he have the power to use the crewmembers, the deckhands to help move barges if he wanted to send one of his own men being the landing man or the barge helper to go get salt? A. Yes, sir, he could do that.

Q. Was there any type of policy, company policy at Landing No. 1 back in January of 1978 as to when extra men might be called out to work? A. The policy at the landing for extra men is only in high water, 10 foot rise.

Q. have you been present for all the testimony in this [303] trial? A. Yes, sir.

Q. And have you heard the conditions, the weather conditions as described by both Mr. Taddar and Mr. Pfeifer? A. yes, sir.

Q. What if any is the company policy as to calling out extra help under those conditions? A. We wouldn't call anybody.

Mr. Libenson: I didn't hear you.

The Witness: We wouldn't call anyone out.

By Mr. Murdoch:

Q. Have you ever under those circumstances without the rising water? A. No, sir.

Q. As a matter of company policy in January 1978 on the 12 to 8 shift, who if anybody would have the responsibility for removal of snow or ice from the gunnels of the fleet to the barges? A. We don't clean gunnels and barges. It melts.

Q. Does anybody have responsibility for putting salt out on the gunnels? A. We don't salt the gunnels either.

Q. Why is that? A. The snow melts rapidly.

Q. What was—

[304] Mr. Libenson: What was the answer?

The Witness: The snow melts rapidly.

By Mr. Murdoch:

Q. What were your responsibilities regarding the availability of pumps at Landing No. 1 back in January of 1978? A. I had the responsibility for ordering pumps, having them repaired and such.

Q. Would you have personal knowledge as to what was available at Landing No. 1 on January 12th, January 13th, 1978 as far as pumps are concerned? A. Yes, sir.

Q. Can you tell me what was available? A. We had three AC pumps.

Q. Can I just interrupt you there? I have used this term and I'm not sure if I use it correctly. What do we mean by AC current pump? A. Alternating current.

Q. Do you have any other pumps? A. Approximately five DC pumps, direct pumps.

Q. What's the distinction between those two pumps? A. The DC pumps are the same as the AC but it's an older system just switching over to a newer system.

Mr. Libenson: If Your Honor please, I'm going to object to the last two answers and ask they be stricken because again he wasn't there at that time at that shift. If [305] Mr. Murdoch is asking him as to the time that he worked, I think that's an appropriate question but for him to testify what was there when he wasn't present, I think is misleading.

Mr. Murdoch: I'm sorry, Your Honor. I thought I had directed to when he was there on the 12th and 13th.

The Court: I understand that to be the testimony that we're limiting it to the shift he was on on the 12th.

Mr. Murdoch: Yes, Your Honor.

The Court: If you want to get into the 13th, okay but I think—

Mr. Murdoch: All right.

By Mr. Murdoch:

Q. We'll limit—

Mr. Libenson: I didn't mean there was a limitation. That's why I made the objection.

By Mr, Murdoch:

Q. You can correct your answer if—I'll repeat the question. What was available as far as you know in the way of pumps at the time you left Jones & Laughlin on January 12th, 1978 at Landing No. 1? A. Three AC motors, five DC motors and six legs of various sizes.

Q. Were there any gas pumps? A. I had 11 gas line pumps at the office on the back.

Q. When you came out to work on January 13th, you [306] would have come out at what time? A. 8 o'clock.

Q. Do you have a present recollection or did you make any note mentally as to what was available in the way of pumps on Landing No. 1 on January 13th? A. No.

The Court: I didn't hear your answer.

The Witness: No, sir.

Mr. Libenson: What was the question? Did he check the next day?

Mr. Murdoch: Yes.

Mr. Libenson: And he made no note of that?

Mr. Murdoch: That's right.

By Mr. Murdoch:

Q. Do you have any personal knowledge as to the accident Mr. Pfeifer has complained of on January 13th? A. No, sir.

Q. You were not present? A. No, sir.

Q. In your capacity as foreman at Landing No. 1, do you have any obligation or duty to have any type of safety meetings or instructional meetings for persons who would be working at Landing No. 1? A. Yes, sir. We're required to have two safety meetings a month.

[307] Mr. Murdoch: That's all I have, Your Honor.

CROSS EXAMINATION

By Mr. Libenson:

Q. Mr. Curran, did you bring in any records of the crew or the captain of the Sidney Johnson? A. No, sir.

Q. When the Pittsburgh Scrap bills you for the use of the motor vessel Sidney Johnson, do they send you a roster of the crew that was on or— A. I haven't seen one of those in several years and I don't recall.

Q. Would there be a record available to show that the Sidney Johnson had the amount of personnel that you said it had? A. Yes, sir.

Q. Where would that record be? A. Probably J & L accounts payable.

Q. You didn't bring that in today? A. No, sir.

Q. You weren't present the morning of January 13th to verify whether there were two deckhands on the Sidney Johnson or not, is that right? A. Yes, sir.

Q. Yes, what? A. I wasn't present to verify it.

[308] Q. You don't have actual knowledge whether there were two deckhands on that motor vessel or just a captain. A. The captain and two deckhands. That's all what were contracted for.

Q. That's all you're contracted for, that's correct but you did not bring in any business records to verify that? A. No, I didn't, sir.

Q. And you don't have any personal knowledge of what the crew was composed of on that particular evening, do you? A. No, sir.

Q. When you worked on the river, J & L had its own boat, is that right? A. When I worked on the river?

Q. They had their own motor vessel. They didn't have contracted boats, is that right? You worked back when— A. Yes, sir. We didn't have any vessels at all.

Q. Didn't you run your own tugboat? A. Not until 1971.

Q. Were you on the river then? A. I was the supervisor.

Q. At that time all the personnel that ran that boat were J & L personnel? A. J & L personnel, yes, sir.

Q. But are there any company operational statements or rules or regulations that you have ever handed to

[309] Mr. Pfeifer in particular or to any landing man telling him that he has control of the crew of a motor vessel to the extent that they can move barges while he leaves the area? A. It's been a practice since I've been at—

Q. Are there any written operational procedures to that effect? A. No, sir.

Q. Have you ever directly told Eddie Pfeifer that he could leave the area while he's headman and let the motor vessel crew take care of moving the barges? A. They have done that if I directed them to leave the area and I can't recall that.

Q. Would you agree that the priorities at No. 1 landing are to keep the elevator or the hoist operating and take care of leaks and then remove snow in that order? A. Maintenance of the landing and service the hoist. No need to remove snow. It melts.

Q. If the temperature is 22 degrees and it's snowing and it's night without any sun between 12 and 8, would snow melt? A. I believe it would, yes, sir.

Q. At 22 degrees? Do you know what degree freezing is? A. Yes, sir.

Q. How much? [310] A. 32.

Q. 22 is 10 below freezing, isn't it? A. Yes, sir.

Q. You still say snow will melt at 22 degrees? A. I think it will.

The Court: Is that because of the water temperature on the water?

The Witness: Because of the air space inside the parts.

By Mr. Libenson:

Q. Would a three inch accumulation of snow melt by itself?

Mr. Murdoch: Objection, Your Honor. There's no testimony there's three inches on any barge.

Mr. Libenson: There have been, Your Honor.

The Court: I say there's circumstantial evidence to that from the weather report.

By Mr. Libenson:

Q. Would three inches of snow melt in a four hour period at 22 degrees temperature? A. I'm not sure that all of it would melt.

Q. At night without the sun? A. I'm not sure all of it would melt, no.

Q. Is it your experience from being on the river that ice forms on these gunnels when there's snow falling? [311] A. It's my experience that ice doesn't form.

Q. That all gunnels are ice free? A. The only time I recall seeing ice on a gunnel is when a pump has been pumping over the side at that point.

Q. Is it your testimony when snow falls it just lays there as snow and ice, never forms on the metal of the gunnels of the barge? A. It melts pretty quickly.

Q. I'd like you to answer my question. Is it your testimony that you have never seen ice form on the metal gunnel of a barge when there's about three inches of snow and the temperature is in the 20s, 22 degrees? A. I have never seen ice.

Q. Have you ever slipped on the gunnel of a barge?

Mr. Murdoch: Objection, Your Honor. I don't think that's relevant.

The Court: Sustain the objection.

By Mr. Libenson:

Q. You say your were foreman of the dayshift, is that right? A. Yes, sir.

Q. You operate out of an office, is that what you say there's an office? A. There's an office there, yes, sir.

Q. Where is the office in relationship to the No. 1 [312] landing? A. 200 feet downriver and up on the bank.

Q. When you say up on the bank, you have to go up steps. Is it higher than the river level? A. Yes, sir.

Q. About high high is it up? A. Maybe 40 feet.

Q. Do you have to go up by a series of steps? A. Yes, sir.

Q. Were you also in charge of No. 1 landing? A. No, sir.

Q. Was there a different foreman? A. No. 2 landing is under the direction of Marine Ways.

Q. Were you also in charge of the belts and everything else with No. 1? A. Yes, sir.

Q. How many men were under your supervision on daylight? A. I can't recall exactly from what I was doing. I'd have to say eight or nine.

The Court: Would that include the three at the landing?

The Witness: Yes, sir.

By Mr. Libenson:

Q. The salt was up at the office you say? Is that [313] where you kept it? A. The salt was downriver from the office at about straight down the river maybe 200 feet.

Q. But up on the bank? A. Yes, sir.

Q. So if salt was necessary at No. 1, they'd have to walk up the steps, pass the office and go down 200 feet and bring it back, is that correct? A. Well, when we used

to use the salt on our own MV Hazelwood, we'd bring the boat underneath the landing platform where the salt is and just set the boat down.

Q. Bring it up by boat? A. Yes, sir.

Q. But you didn't have a boat on January 13th, 1978. A. We had the Sidney Johnson.

Q. Is it your testimony the Sidney Johnson was used to bring the salt? A. I'm saying she could have been, sir.

Q. What do you know happened?

Mr. Murdoch: Objection, Your Honor. It's already been testified he's not there; he wasn't present.

The Court: You're talking about bringing the salt, aren't you.

Mr. Libenson: Yes, sir.

Mr. Murdoch: I still don't understand the question [314] when it's directed to the time of the accident or—

Mr. Libenson: Yes, at the time of the accident.

Mr. Murdoch: He's already testified he has no present knowledge. He wasn't there.

The Court: What was your question?

Mr. Libenson: My first question was he said the salt could have been brought by the Sidney Johnson and I asked him if he knows whether it was or not and the objection—

The Court: We don't even know when the salt came, right?

The Witness: I don't know if salt was ever delivered up there.

By Mr. Libenson:

Q. Do you have any knowledge of any delivery of salt to the No. 1 landing in January of 1978? A. No, sir.

Q. Was it daylight's turn's job to deliver salt to the landing? A. No, sir.

Q. Did you ever direct anyone on daylight to do that? A. No, sir.

Q. Did you have any set or written operational procedures as to the delivering of salt to the landing? A. No, sir.

Q. You do agree that salt was utilized by J & L in [315] the wintertime? A. Yes, sir.

Q. What was the purpose of the salt? A. To thaw out switches and railroad tracks and walkways and stuff like that.

Q. Did you ever see it used on No. 1 landing on the barges, on the gunnels of barges? A. No, sir.

Q. Do you know if it was ever used in that manner? A. I don't know.

Q. On the daylight turn, the hoist was not operating, is that correct? A. Daylight of the 13th?

Q. Usually on daylight turn the hoist— A. Yes, sir. That would—Prior to the coal strike. When the coal strike started about December 1st, '77, there was more use of the coal hoist.

Q. Let me ask you. On January 13th, 1978 on the daylight turn, which is the turn you worked, is that correct? A. Yes, sir.

Q. Was that elevator and hoist working during your turn? A. I can't recall.

Q. Was it unusual or usual for it to run on your turn? A. It would be unusual.

[316] Q. It's been testified to and I ask whether or not you agree that the daylight turn did mostly maintenance so that the other two turns would run the hoist? Is that the normal procedure? A. The daylight crew did clear up on the conveyor system.

Q. I used the word maintenance. A. Maintenance is—There's a maintenance foreman that would handle the repair of the machinery.

Q. These pumps that you referred to you say they were in the office? A. No, sir.

Q. Where were they? A. The AC pumps and the DC pumps were at the landing. I had 11 gasoline pumps up at the office.

Q. How far is Landing 2 from Landing 1? A. 13, 1400 feet.

Q. Were these pumps used—Did Landing 2 use the same pumps? A. Yes, same types of pumps. They were interchangeable.

Q. Did they use the same pumps you're referring to on an interchangeable basis? A. Yes, sir. If we wanted to borrow pumps from them, we could do that but they could not use our AC pumps.

[317] Q. AC are these the three-piece pumps? A. Yes, sir. They're all three-piece ones.

Q. That were testified in this case? A. Yes.

Q. And there were three of those? A. Yes, sir.

Q. The DC pumps were different? A. Different type of electricity feeding them, 25 cycle as opposed to 60 cycle and they didn't have a breakerbox on them.

Q. Is that what Mr. Pfeifer referred to as the old style pumps? A. Yes, sir.

Q. And this is the one where you could have more than one pump operating off of one line on the DC? A. Yes, sir.

Q. And on the AC, that did not happen or could not be done. They had one pump on one line? A. Yes, sir.

Q. You had the DC pumps before the AC, is that right? A. DC pumps were there when I started.

Q. And the AC pumps came on later? A. Probably around December '77.

Q. Do you have any knowledge where the DC pumps were on the 12 to 8 shift on January 13th, 1978? [318] A. No, sir.

Q. Is there any written policy concerning extra help on snow or bad weather conditions? A. No, sir.

Q. Does the union contract have any provisions in it concerning extra help under those conditions? A. No, sir, not to my knowledge.

Q. On the date of this incident, were you a union member or management? A. Management.

Q. Do you have any repair records for these pumps that you have talked about for the date in question, January 13th, 1978?

Mr. Murdoch: Objection, Your Honor. I don't think that's relevant.

The Court: What would be the relevance of that?

Mr. Libenson: The relevance is whether this equipment was available.

The Court: The witness may answer.

A. I imagine the records are in the plant. I don't have them myself.

Mr. Libenson: Excuse me one minute, Your Honor.

(Pause)

By Mr. Libenson:

Q. Do you have in your job on daylight, do you check [319] the fleet of barges? A. Not all the time.

Q. Do you recall whether you did on January 12th, 1978? A. I couldn't answer that.

Q. You have no knowledge whether or not a pump was operating on this 1384 barge on your shift, do you? A. I wouldn't know, sir.

Q. Is a sinking barge considered an emergency? A. Yes, sir.

Mr. Libenson: I have nothing further.

Mr. Murdoch: Just several questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Murdoch:

Q. You already testified on direct examination that the headman, somebody working in Mr. Pfeifer's position had certain control over the crewmembers. Did he have control to use the Sidney Johnson assuming there woould be salt down at your landing to bring—not at your landing but your office to put salt on there to bring it up to Landing No. 1? A. Yes, sir, he can do that.

Q. I was a little confused by one part of your testimony on cross examination. Do you have any present recollection today as to whether or not there was salt available on January 12th when you left? [320] A. Yes, sir. I know there was salt there.

Q. You were questioned also about the use of the hoist during the No. 2 turn. I believe you stated there was a strike, is that correct? A. The miners went on strike on December 1st, '77 I believe.

Q. If there is no strike or was no strike, would it be unusual for the hoist to be working on the No. 2 shift? A. Yes, sir. We were trying to pick up coal from Fleureff and unload it in Pittsburgh.

Q. What is Fleureff? A. It.s a coal storage area upriver.

Q. Therefore, under the circumstances of a strike, was it unusual in January 1978 to have the hoist working during the No. 2 turn? A. Yes, sir, it would be unusual except if there was a strike.

Q. Such as we had in January 1978? A. Yes.

Mr. Murdoch: That's all, Your Honor.

RECROSS EXAMINATION

By Mr. Libenson:

Q. Do you have any direct knowledge of any instruction from you or any other foreman at J & L to Howard Pfeifer that he had the authority to have this vessel pick up salt as you [321] described? A. All the landing men at one time or another received instructions from me to go out and tell the captain this is what you want and that's what he does.

Q. Did you ever tell that to Howard Pfeifer? A. Yes, I'm sure he did.

Q. You yourself? A. Yes.

Q. When did you do that? A. If he's working on daylight with me as headman, I tell him go out and put the boats here and there.

Q. Do you have a specific recollection of making that statement to him? A. No, I can't now.

Mr. Libenson: I have nothing further.

Mr. Murdoch: I have nothing further.

The Court: Thank you, Mr. Curran.

(Witness excused.)

The Court: Unless you have some reason to stop, I'd just as soon keep going until 12:30.

SHERMAN HADDIX called as a witness by the defendant, first being duly sworn, testified as follows:

[322] Direct Examination

By Mr. Murdoch:

Q. Mr. Haddix, where do you live? A. 1309 German Avenue, Pittsburgh 12.

Q. Are you married, sir? A. Yes, sir.

Q. Whom do you reside with? A. J & L Steel Pittsburgh Works.

Q. That's who you're employed by? A. Yes.

Q. Do you have any children living at home with you? A. Three.

Q. What are their ages? A. 15, 14 and 12.

Q. Can you tell me now how long you have been employed by Jones & Laughlin? A. This coming June it will be 30 years.

Q. I guess you have worked in quite a few job capacities over the time period. Can you give us a rundown of what your experience with—A. You start out as a laborer and you work your way through different job lines which I have worked every job in the department.

Q. What department are we talking about? A. Coal Handling By-product.

[323] Q. That's the department that you're presently employed in? A. Yes, sir.

Q. And that Mr. Pfeifer was last employed in in January of 1978? A. Yes, sir.

Q. What is your present job title? A. Turn supervisor.

Q. Can you tell me what job title you had back in January of 1978? A. Turn supervisor.

Q. What are your duties as a turn supervisor? A. As a turn supervisor, you come in and the prior turn instructs you, gives you instructions what they have done and where they have left off and I pick up from there and line your own turn up that is in the process of moving coal and so forth.

Q. How long have you held the position of turn supervisor? A. Six years.

Q. Were you working on January 13th, 1978? A. Yes, sir.

Q. As turn supervisor? A. Yes, sir.

Q. Can you tell me who worked with you on that [324] particular turn? A. You mean for the whole department?

Q. I'm sorry. Let's limit it to—When you say whole department, how do you break it down from the whole department? A. We have what we consider as a belt line which involves different people at various points and then we have a river line.

Q. Let's talk about both. People on the belt line are they your responsibility? A. Yes, sir.

Q. What positions were working that night? A. From the ovens if we have them listed now as equipment attached one through five, crusher operator that is in the belt line, a crusher operator, a mix operator and a sample man.

Q. How do we distinguish the belt line from the river line?

The Court: Excuse me. I counted eight then, is that right? You said one through five something or the other.

The Witness: That is the belt itself. That's the belts and then we have what we consider as a crusher operator and then we have a mix operator and then we have a sample man.

The Court: That's eight on the belt line.

[325] By Mr. Murdoch:

Q. How do we distinguish the belt line from the river line? A. Distinguish through job title and the way we have them scheduled.

Q. What job classifications do you have on the river line? A. From barge helper to hoist operator as they run in sequence.

Q. How many individuals would have been working the 12 to 8 shift on January 13th on the river line? A. We had three men involved on the No. 1 landing: hoist operator, a barge helper, a hoister and a rigger.

Q. Will you repeat again—You talked about the three men. That would be on the— A. On the landing.

Q. What are their titles? A. There's different titles. We call them bargemen. That's the landing man, a barge helper and a landing helper.

Q. Those are three men. Would they be the positions that Mr. Tadder, Mr. Hicks and Mr. Pfeifer were working in on January 13th? A. Yes, sir.

Q. You talked about the other men on the river line. We didn't get those positions. [326] A. Underneath we have a hoist oiler and reader and a barge helper and then we have a hoist operator.

Q. Are they at Landing No. 1? A. In a combination. It works in sequence. It's stretched out over a period of approximately 450 foot.

Q. Do you recall what the weather was on January 13th, '78? A. At the beginning of the turn if I recollect right, we had a combination of sort of snow and a sleeting drizzle and then it changed to snow flurries.

Q. When did it change to snow flurries? A. I'd say in the neighborhood of 12:30, 1 o'clock.

Q. What time did you come out to work on that day? A. We usually come in early which would have been about 11 o'clock.

Q. Do you have a particular office that you go to? A. Yes, sir.

Q. Is this office different from where Mr. Pfeifer and Mr. Tadder and Mr. Hicks would report? A. They report to the office and then they proceed on down to a little shanty boat on the river which we consider as the pump boat.

Q. Why do they come first to your office? A. That's more of a—more or less of a reporting in session that we have.

[327] Q. Are they in their work clothes ready to go to work? A. At that particular time, no. I'll take that back. Mr. Hicks and Mr. Tadder have been in their work clothes. Mr. Pfeifer though resided on the pump boat which we had lockers that he changed there.

Q. Do you recall these three individuals coming to you on this particular day? A. Yes, sir.

Q. What again is the purpose for them coming to talk with you? Are you giving them some type of directions? A. Well, not at that particular time. They report before 12 o'clock. That's before our starting time.

Q. Just to make sure they're there physically? A. Right. In other words, our job is covered before the turn starts.

Q. What do you do after these men come in and you know you have a full crew? A. I check the conditions that's left prior to the preceding turn and then I make a list out normally either by phone or on a slip of paper that is for the river line and movements of barges to the hoist and then by phone like I stated, we call or one of the helpers if he comes in late or we give him the slip and he delivers to the landing to the headman.

Q. Mr. Haddix, when you say you come out and you check [328] to see what the previous turn had done, are there documents or records that you look at? A. Well, only on our work sheets.

Q. Work sheet. Is that the title of a document that you as a foreman or turn supervisor fill out or look at? A. Yes. We make one out and then in turn we get a report from the landing.

Q. Mr. Pfeifer had mentioned landing reports in his testimony. What responsibility if any do you have towards those? A. Responsibility is whenever Mr. Pfeifer delivered them to the office, we checked them over to more or less verify them. We keep one copy for ourselves and the balance goes to the main office for records.

Q. Do you yourself as turn supervisor have any responsibility or duty to make any notations or to fill in any part of the landing report? A. We do catch prior to the turn barges come in that we do catch what they might leave off we call the landing and give them the numbers of barges as such to add to and then in turn if there's like I said, if there's barges left off, we put them on.

Q. Do you have any type of log or any type of forms that you fill out that you're responsible for as a turn supervisor? [329] A. There's our master worksheet, yes, sir.

Q. After you came out to work on January 13th and you knew you had a full crew, what do you recall doing next? A. Through the preceding turn, I made a notation of what I would need to the elevator or to carry me through my eight hour turn.

Q. Was that information sometime conveyed to Landing No. 1? A. That would be relayed in the neighborhood from 12 to 12:30 at the latest.

Q. Do you recall how it was done in this particular instance? A. Not this particular instance, no.

Q. Does it vary from time to time? A. Yes, sir. Some of our people insist that we give them a written statement and other ones will take the message by phone.

Q. Do you have any recollection when after Mr. Pfeifer and Mr. Hicks came up at least to report in when you next talked with Mr. Pfeifer whether by phone or in person? A. That would have been in the neighborhood of 12 and 12:30.

Q. Do you have any recollection on January 13th, 1978 of talking with Mr. Pfeifer concerning calling out additional persons to work? A. No, sir.

[330] Q. Is there a company policy that you are aware of as to when additional work members are called out to work at Landing No. 1? A. Only in high water.

Q. Did you have high water on January 13th, 1978? A. Well, with the conditions, I'd say no.

Q. And the conditions that you observed and actually worked in yourself on January 13th, 1978 were these unusual weather conditions? A. Not for this particular time of year, no.

Q. Does work go forward under these conditions when they're there? A. Yes, sir.

Q. On January 13th, 1978, do you have any recollection of Mr. Pfeifer or anyone else for that matter request-

ing that salt be made available? A. Yes, sir. Mr. Pfeifer did ask for salt and he asked his part to be delivered and we did tell them we did have no people to deliver salt but it was available for his convenience if he wanted to come up and get it.

Q. Who has responsibility down on Landing No. 1 to get salt if they want? A. The headman himself.

Q. Can he delegate that to anybody who's working under him? [331] A. Yes, sir.

Q. To whom? A. The landing helper.

Q. What about to the crew members of the working vessel working in that area? A. Motor vessel for obtaining salt I'd say you have to go through the captain himself. That would be up to them.

Q. Does he have the ability to control the crew members of the motor vessel as far as movement of barges? A. The movement of barges, yes.

Q. Does he have the ability to engage the crew members from the motor vessel in moving barges to free one of his underlings to go and get salt?

Mr. Libenson: Objection. It's a theoretical question.

The Court: Would you please read the question?

(The questions was read by the reporter.)

The Court: The question is not clear to me. I'm not sure what you mean by ability.

Mr. Murdoch: I'll rephrase it, Your Honor.

By Mr. Murdoch:

Q. Does he have the authority to engage the crew members from a motor vessel Sidney Johnson or whatever motor vessel would be working on a given shift

to move barges while [332] allowing one of his men either the landing helper or the barge helper to go get salt? A. Yes.

Q. Do you have any present recollection as to whether or not there was a motor vessel working at Landing No. 1 on January 13th? A. The MV Sidney Johnson.

Q. Did you observe that? A. Yes, sir. I even spoke to the captain.

Q. Do you have any present recollection as to whether or not there were any crew members in addition to the captain on the motor vessel Sidney Johnson that turn? A. Two deckhands.

Q. About what time during this particular shift, Mr. Haddix, do you recall the request for salt? A. That was whenever the order was given and barges that we would need to operate the eight-hour turn.

Q. Would that be in the same discussion—You don't have any recollection of request for extra help, is that correct? A. No, sir.

Q. Who would have the responsibility on a 12 to 8 shift at Landing No. 1 to make use of salt? A. Make use of it would be the landing man himself. In other words, he uses his judgment to maintain the fleet.

[333] Q. When you talk about the landing man, would that be the man, also the headman in Mr. Pfeifer's position on January 13th, 1978? A. Yes, sir.

Q. Did you receive any other requests during that particular shift from Mr. Pfeifer or anyone else for salt? A. No, sir.

Q. What responsibilities or over what area did you have responsibilities on the 12 to 8 shift on January 13th, 1978? A. The river line was like I stated before the belt line.

Q. Did you have any occasion to go down to Landing No. 1 during this particular shift? A. At Landing No. 1, I did go down between—I was down there between the hours of one and three.

Q. Were you down there—So I understand your answer, were you down there for the two-hour period or you went down— A. For the two-hour period.

Q. You were down Landing No. 1 for two hours? A. Yes.

Q. What was your reason for being down at Landing No. 1? A. That Mr. Pfeifer did call and said he had a bad barge and he thought he would need assistance with it so I [334] proceeded down to check it out.

Q. What did you observe when you got down there? A. The barge was listing which was no more than normal with the water it taken on.

Q. When you got to Landing No. 1, did you make any observation as to whether or not there were any pumps working on that particular barge? A. One.

Q. Can you tell me where that was? A. It was the quarter pump box on the upper end the way the barge was situated.

Mr. Libenson: How did you say that?
The Witness: Quarter pump box.

By Mr. Murdoch:

Q. Did you make any observation when you got down to Landing No. 1 as to whether or not there were any other pumps available for use? A. Yes, sir. In fact, I assisted in carrying one motor myself.

Q. Out to this particular barge? A. Yes, sir.

Q. Who all was present at the barge at the time you assisted taking the siphoning the motor out? A. Mr. Hicks, Mr. Tadder and Mr. Pfeifer.

Q. What was done at that time? [335] A. Two additional guns were installed in the bulkhead of the barge that was taking on water.

Mr. Libenson: Guns?

By Mr. Murdoch:

Q. When you say guns, what are we talking about? A. That's the siphons themselves.

The Court: The legs you mean?

The Witness: Yes. It's considered as one unit as a gun.

By Mr. Murdoch:

Q. When you used the pump siphon and pump, you mean the same thing. When you talk about the legs you're talking about the entire unit? A. Yes, sir.

Q. Two others were inserted, is that correct? A. Yes, sir.

Q. What else was done at that particular point and time? A. In reference to the—

Q. Reference to that barge. A. In reference to the barge, that would be about it.

Q. Were there any other pumps available that you were aware of? A. Yes, sir.

Q. Where would they have been kept that shift? [336] A. We had three at the time was working as our head fleet barge.

Mr. Libenson: Three working?

The Witness: Right. That's in conjunction with what we had at that time too was the steam siphons which did the same work as the electric siphons did.

By Mr. Murdoch:

Q. Were the steam siphons available? A. Steam siphons were installed in the head fleet too. They were more or less of a permanent fixture.

Q. The two-hour period that you spent down on Landing No. 1 was it in reference to this particular barge? A. Yes, sir.

Q. Where did you go then after you left Landing No. 1? A. After I saw the guns we had installed was making headway which the barge started to raise above the crack that was taking on water, I proceeded back to the office to do some of my paperwork and then in turn I made my rounds over the belt system.

Q. In 1978, would you be working only the 12 to 8 shift or would you as a turn supervisor you would have different turns you would work? A. We're scheduled five days 12 to 8 and then 4 to 12.

Q. At any time during the 12 to 8 shift, did you receive any report from anyone that Landing No. 1 and [337] particularly Mr. Pfeifer that there was a possible breakaway or a partial breakaway of barges? A. None whatsoever.

Q. Would this be something again as far as the policy of Jones & Laughlin that you as a turn supervisor would expect to receive a report if that happened? A. No. The way we like I stated before about giving the line up the way our barges are situated they're not always on the outside of our fleet where we don't have to go to the inside and there is a possibility that they had to go to the inside after a particular barge which I had in the lineup and by doing so, they might have moved barges on the outside and, say, tied them off on a single sideline and by doing this with the movement of the boat pulling out

the barge that we needed could have snapped the line that the other barge was moored to.

Q. But you would not necessarily receive a report of that? A. No, sir.

Q. Would a notation and an occurrence like that be made on the landing report? A. No. That's more or less like a daily routine that comes with the job.

Q. What is the purpose of having the motor vessel, in this case Sidney Johnson, available at Landing No. 1? A. We did have the MV Hazelwood and it was out of [338] service.

Q. What use do you make of the Sidney Johnson? A. That is after we give our lineup to the headman, he in turn takes it to the captain of the boat and points out where the barges are at and by doing so place them to the hoist.

Q. What's the purpose of having the two crew members, two deckhands onboard the motor vessel? A. Whenever you hire a vendor, you hire the crew with it.

Q. They actually do work. They're not just for ornamental purposes? A. No, sir. They assist.

Q. Whose responsibility is it during the 12 to 8 shift to make sure that there's housekeeping done as far as keeping the landing clean and the gunnels of the barges? A. That is the headman's.

Q. Did you have what you would consider to be a full crew, full working crew underneath you on the river line on January 13th, 1978? A. Well, with the MV Sidney Johnson, I'd say we had abundant crew. In fact, we had over the two deckhands plus the pilot.

Q. Did you at anytime on that particular shift, Mr. Haddix, receive any notification of a fall by Mr. Pfeifer? [339] A. A fall at the beginning of the turn to my

recollection if Mr. Pfeifer had slipped as he left the pump boat and then later on in the turn I did get a call from Mr. Pfeifer again that he slipped and fell again and in my understanding that we have wires that connects our barges together that he fell on one of the knuckles of the wires.

Q. I'm a land lover so you'll have to explain what knuckles are and wires. How did Mr. Pfeifer describe to you the happening of this fall? A. Well, stepping from one barge to another which the barge that was pumping was slightly lower than the one he was stepping from and from doing so he stepped on the knuckle which is attached to the wire. The wire what I meant reference to is what couples our barges together which holds them together and they're used as a section with links and what we call pelican hooks to hold them together and ratchets drew them up snug to hold them together.

Q. Can you describe the shape of a knuckle and the size of it? A. It's about so big. (Indicating)

Q. Can you give us in inches because the court reporter can't— A. I'd say about four inches across.

Q. Is it shaped in what manner? A. It's round and then tapered back to the size of [340] the cable which in turn they vary from an inch and a quarter to an inch and $^{5}/_{8}$ and it has two ears on it where a chain can slip into it with a pin that goes through to hold it together.

Q. The purpose of the knuckle is that to do something as far as tying up barges as opposed to being part of the unit to make a pump operate? A. No. That's just part of the barge itself. It helps hold the barges together.

Q. Are these on all barges? A. Yes, sir.

Q. How many knuckles would there be on a barge? A. Two.

Q. Mr. Pfeifer stated to you that he stepped on one of those and fell, is that right? A. Yes, sir.

Q. Was there any reference made to the fact that he slid on snow? A. No, sir.

Q. What time was this report made to you? A. A little after four.

Q. And it was done in what manner? A. By phone.

The Court: I didn't hear you.

The Witness: By phone.

[341] By Mr. Murdoch:

Q. What was your response to Mr. Pfeifer after being informed of this fall? A. I asked Mr. Pfeifer if he was going to the dispensary and he said no. He said, "I think I can shake it off."

Q. Did you have occasion to see Mr. Pfeifer after that during this particular shift? A. At 6 a.m. in the morning whenever he delivers his reports to the office.

Q. Are these landing reports we're talking about? A. Yes, sir.

Mr. Libenson: Excuse me. Did he say he saw him at 6 a.m.?

The Witness: 6 a.m. when he delivered his reports to the office.

By Mr. Murdoch:

Q. Was there any reference made at that meeting regarding his fall or alleged injury? A. I mentioned it to him about it and he said yes, he was a little sore and he had a slight bruise.

Q. Did you talk with either Mr. Tadder or Mr. Hicks regarding this incident? A. No.

Q. When he reported this incident to you, did he state [342] whether or not he was carrying anything at the time this occurred? A. No, sir.

Q. Did he state to you the barge numbers that this occurred on? A. Not barge numbers in itself just on the barge that we were pumping.

Q. As you understand it, the barge was being pumped was that higher or lower than the barges next to it? A. It was lower.

Q. Was Mr. Pfeifer stepping onto the barge that was being pumped or— A. Onto the barge that was being pumped.

Q. Are there ever any safety meetings, were there safety meetings held by you or other foremen concerning how to walk, how to conduct yourself when you're out on the fleet in snow? A. There's safety meetings and contacts as we call them, personal contacts. The employees are instructed to step over hatch covers, watch for slick areas which consist of grease and so forth and oil that's on gunnels of barges and step over the wires that are laying on the—the wires and the work lines that normally is laying on the barge that the standing personnel use.

The Court: We'll reconvene at quarter of two.

[343] (Court was thereupon recessed at 12:30 p.m. After the recess, the following proceedings were held commencing at 1:50 p.m.)

The Court: Good afternoon.

(Witness resumed the stand.)

The Court: Okay, Mr. Murdoch.

Mr. Murdoch: Thank you, Your Honor. I just have a few more questions, Mr. Haddix.

By Mr. Murdoch:

Q. You have worked as a turn supervisor for a number of years down at Landing No. 1, is that correct? A. About six years, yes.

Q. And I believe you testified that part of those duties would require determining at the start of your turn what barges you're going to use and so on as far— A. Not so much the barge, the type of coal.

Q. The type of coal? A. Yes, sir.

Q. You worked the entire 12 to 8 shift on January 13th? A. Yes, sir.

Q. Was this what you would consider to be a busy shift as compared to other 12 to 8 shifts? A. No. It was a little bit on the slow side in fact [344] due to the coal strike.

Q. When you mean slow, can you qualify that or explain it more for me? A. Tonnagewise I'd say approximately 1500 to 2,000 ton lighter than normal turn would be.

Q. There's been some discussion, Mr. Haddix, about the hoist or the elevator using the term interchangably. Are you familiar with the controls of that hoist or elevator? A. Yes, sir. I have operated it.

Q. Can that be speeded up? A. No, not on the lifting of coal but the barge movement can be controlled.

The Court: The what?

The Witness: Barge movement.

By Mr. Murdoch:

Q. But you cannot actually speed up to get more coal out by speeding up the hoist, is that correct? A. The bucket themselves is one standard speed and that's it.

Q. At Landing No. 1 in the area where this leaking barge would have to be, are there any discharge systems from the mill in general? A. I'd say from approximately the middle of our fleet.

Q. What type of material is discharged from that? A. Normally treated water that they use in the upper [345] part of the mill for cooling processes and so forth.

Q. Would you be familiar with the temperature range of that type of water that comes out of there? A. I'd say it would be for the type of day we had it would be warm enough that you could shower with it.

Q. Shower with it? A. Yes.

The Court: How far up from the landing is that discharge point?

The Witness: That's right in the middle of the landing itself.

By Mr. Murdoch:

Q. I have gone by the rivers and have noticed steam coming off the rivers at time. Does that happen often? A. That's with the system that they have today not only from J & L but other mills contributing to the flow of warm water is discharged in the river plus the movement of the two boats it keeps the water above normal temperature.

Q. Does that have any effect in your practical and personal experience as to how it would affect the temperature of the barges or the gunnels?

Mr. Libenson: Objection, Your Honor. This man hasn't been qualified without an expert's report.

The Court: I don't think you need to be an expert for this. We'll overrule it.

[346] By Mr. Murdoch:

Q. You may answer. A. The temperature of the water would keep the barges in our landing above normal conditions that's pertaining to cold weather.

Q. There's been some discussion as far as the makeup of the barge with the gunnel and the bulkhead. The area that the coal is put into, what do we call it? A. That's the hopper.

Q. And is there any space between the hopper and the outside skin of the barge? A. Well, on the upper surface you have approximately 20 to 24 inches of walking space which we classify as gunnel.

Q. And this is the area where the water might come in that you insert the pump leg into, is that correct? A. Yes.

Mr. Murdoch: That's all I have, Your Honor.

CROSS EXAMINATION

By Mr. Libenson:

Q. Mr. Haddix, did you prepare a written statement of this accident at anytime? A. The only time that I made any statement whatsoever pertaining to the accident is after Mr. Pfeifer went to the dispensary and the dispensary slip came back to the department.

Q. Did you make a written statement of this accident [347] to Mr. Murdoch? A. No, sir.

Q. Is turn supervisor the same as foreman? A. Yes, sir.

Q. Is that an interchangeable term? A. Well, as foreman, it was classified as such until just recently for some reason or the other they just classified it as supervisor.

Q. They dropped the term supervisor? A. In a roundabout way. It's the same difference.

Q. Do you agree that the temperature that evening was as low as 22 degrees? A. Yes, sir.

Q. And do you agree that water or snow will freeze at 22 degrees? A. Under normal conditions, I'd say yes.

Q. In your experience of 30 years and of working in this area, have you seen barges come in off the river in the wintertime with as much as a foot or foot and a half of ice on them? A. Whenever a barge is being towed and before it goes into the landing, the upper part of the river where you have much cleaner water, spray from the river itself from the movement of the barges will freeze and that will form ice on the end of the barges.

[348] Q. Is it the practice of your company to put salt on these barges so that you cannot only walk on them but to free up the load it can be taken from the barge onto the elevator? A. In reference what are you referring to as company?

Q. Jones & Laughlin. A. Well, the employee as such it is his responsibility whenever a tow comes in to accept or reject the barge and the towboat in general has the responsibility if need be to clean gunnels and salt.

Q. But in your time at No. 1 coal landing, have you seen barges that have come in with ice on them? A. Yes, sir.

Q. What do you have to do to take off the ice? A. The heavy stuff we usually send picks, bars and shovels to the landing personnel to chip away and salt.

Q. So there is a procedure for ice and snow on barges, is that right? A. Yes, sir.

Mr. Murdoch: Your Honor, I object to the question for two reasons. The procedure that Mr. Libenson has outlined in his question has been for

a barge that has been out on tow brought in with a foot of ice. I object on the basis we don't have that in this case. In fact, Mr. Pfeifer's own testimony was that that barge was in the fleet for one to two weeks and we don't have the testimony or the situation that Mr. Libenson [349] has questioned about.

The Court: I think it's relevant to the overall picture. We'll overrule it.

By Mr. Libenson:

Q. The work that's done on these barges is after it's tied up and in the fleet, isn't it? A. No, sir. Like I stated before, the boat in question that's delivering the tow.

Q. They don't do this breaking up of ice or whatever by picks as you described it with salt while the boat is out in the middle of the river, do they? A. The head of the tow normally they do have what they call splashboards that's installed on the head of the tow which in turn breaks the spray that develops from the head of the tow from forming too far back on the head barges.

Q. Once a boat is accepted and if it does have ice on it, the work is done after it is made part of a coupling, is that right? A. Yes, sir.

Q. So people at J & L at No. 1 have done this type of work before of using salt to get rid of ice on barges, is that correct? A. That's the landing personnel's responsibility.

Q. Was it your testimony that Howard—Do you call him Eddie or Howard? [350] A. Eddie.

Q. That he stopped in to see you on the night of January 13th, 1978? A. No, sir. That's more of every turn—

Q. You don't have any specific recollection of him stopping in to see you that night? A. All employees on the river line especially they do stop at the office to gather a little preturn data before proceeding to the job.

Q. My question, sir, is not what he generally does. Do you have a specific recollection of his stopping in that night? A. That particular night, yes, sir.

Q. You say he did stop in? A. Yes, sir.

Q. Did you hear him testify that he did not? A. No, sir.

Q. You weren't in court every day that he testified? A. No, sir.

Q. I think you testified between 12 and 12:30 within the first half hour of starting the turn you advised him what barges you wanted moved and at the same time or during the same conversation, he asked you for salt, is that correct? A. Barges now if you're in reference by number like I stated before, we do not advise by number unless we do get a [351] notation if it's a real bad leaker.

Q. I didn't mean to pin you down in numbers. I mean you gave him the general work orders. A. Or the type of coal.

Q. The type of coal, whatever had to be done on that turn between 12 and 12:30. A. Yes, sir.

Q. And during that same conversation, I think you stated that he did ask you to have some salt made available. A. Yes, sir.

Q. Did he say why? A. That they would possibly need it before the turn had elapsed.

Q. And at that time, had you been down to the fleet? A. Not at that particular time. It was after the conversation.

Q. Do you recall him asking for additional help that night because of the snow and ice that accumulated on the barges? A. No, sir.

Q. Had you ever gotten that type of request? A. No.

Q. Who generally—Strike that.

Is it customary that the daylight turn does the shoveling of the barges, the gunnels and barges when there's [352] an accumulation of snow? A. Well, not necessarily. Daylight does their own maintaining of the fleet and turn same as 4 to 12 and 12 to 8.

Q. Isn't it true on daylight turn they don't move the barges under the hoist? A. That's under certain conditions. Had he, say, a breakdown 12 to 8 turn, we do overlap and operate on daylight.

Q. But ordinarily, isn't daylight or I think as Mr. Curran has testified getting the belts cleaned up and that type of work and the hoist doesn't run? A. Well, that belt cleaning and so forth is only done by the labor force that we had.

Q. When that's going on, the whole hoist doesn't run, does it? A. We have a combination, yes, sir. We carry our night people over whenever the hoist is operating and we still have our daylight laborers which part of our system is not operating that they do work on.

Q. Isn't it true that if the belts aren't running to carry the coal away from the hoist, there's no place for the coal to drop? A. When the belt is not running, yes, sir.

Q. And isn't it also true that the time when the belt work is cleaned or inspected or set down is ordinarily on the daylight turn? [353] A. Yes, sir.

Q. And you still have the same number of people on the river on the daylight turn as you do on the other two turns, isn't that correct? A. Well, on the landing itself.

Q. That's my question as to the landing? A. Yes, sir.

Q. You still have three people there? A. Yes, sir.

Q. On all three turns? A. Yes, sir.

Q. And when the—Isn't it true that in most cases on the daylight turn these three men on the landing aren't moving barges to the extent that they do on the other two turns? A. In fact, on daylight they sometimes move more barges than on—

Q. I'm not talking a particular time, sir. I would like to ask you to respond as to what the general situation is.

Mr. Murdoch: Your Honor, I think he did respond generally.

The Court: Well, I don't think he did but generally speaking without anything unusual happening like the belt being broken down or something, is the hoist used during daylight?

[354] The Witness: No, sir. Only in the case of emergency or unless the —at the time—At that particular time, we did have steam boilers which we supplied with coal and if the 4 to 12 or 12 to 8 didn't have time, daylight would supply this.

By Mr. Libenson:

Q. You testified, and I made some notes; I'm not sure I got it all, that you had occasion to go down to the landing that evening Mr. Pfeifer was injured, is that correct? A. My standard of practice at that particular time and before was to try to make my rounds of all jobs in the department.

Q. Do you have a clear recollection of visiting No. 1 landing the evening he was injured? A. Yes, sir, between 1 and 3.

Q. And is it your testimony you were there between 1 and 3? A. Yes, sir.

Q. Continuously? A. Yes, sir.

Q. And who were you with during that period? A. Mr. Pfeifer, Mr. Hicks and Mr. Tadder plus the deckhands that we had on the Sidney Johnson.

Q. What were you doing for two hours down there? A. Like I stated before, this barge that was leaking Mr. Pfeifer and Mr. Hicks and Mr. Tadder had placed an extra gun [355] in the bulkhead and after I visited the landing, I assisted in salting another.

Q. You're using the word gun in the same context as we have been using pump? A. Pump or siphon.

Q. Any one of those three words mean the same thing to you fellows, is that right? A. Well, just like I stated before, the gun is consisting of the head and the leg itself as a unit.

Q. It's an assembled pump? A. Yes, sir.

The Court: I'd like one thing for clarification before Mr. Libenson moves on. You said that the plaintiff, Mr. Pfeifer, and Mr. Tadder and Mr. Hicks had already put a pump in the barge?

The Witness: Yes, sir.

By Mr. Libenson:

Q. Did that mean that when you arrived, there were two pumps in the barge or one? A. Two.

Q. And I think you testified that there was one at the quarterhead. A. Yes, sir.

Q. And that's the pump that was put in the gunnel, the gunnel hold, is that right? [356] A. On the gunnel, yes, sir.

Q. And that was in operation? A. That had been in operation from the prior turn.

Q. Had you seen it in operation from the prior turn? A. From visual inspection from the bank, yes.

Q. You say that there was a second pump in operation when you got there? A. Yes, sir.

Q. And this is a pump that you were not involved in placing? A. No, sir.

Q. Was this the type of pump that required the electric motor and the circuit switch and the steam? A. At the time, I did not observe that.

Q. Where was this second pump that you say was in operation when you got there located? A. That was in the bulkhead, the upper end of the barge.

Q. Was that functioning? A. Yes, sir.

Q. You had nothing to do with placing that pump in there? A. No, sir.

Q. Are you sure what time of night that was that you [357] A. Not exactly the right time but it was between 1 and 3.

Q. Why do you say 1 and 3? How do you know what you were doing after that? A. After 3?

Q. Yes, sir. A. Like I stated before, after I left the landing, which I observed the time, I went to the office and did part of my paperwork and from there I proceeded to the belt line for visual inspection.

Q. And during this period of two hours that you say you were there in which you say you observed two pumps in operation, what did you do? A. The two pumps with the condition of the barge and—I hadn't seen the barge before the second pump was installed of how much water was in it. I didn't know whether it was making

any headway on the water that was there but I more or less insisted we should put another in.

Q. That would be a third pump? A. Yes, sir.

Q. Where did you want it placed? A. In the same section that the second pump had been placed.

Q. That would be the bulkhead? A. Yes, sir.

[358] Q. Who placed that third pump in? A. Mr. Tadder placed the leg and like I stated prior, the head which I carried myself and placed on the leg.

Q. When you say the head, that's the motor, the electric motor? A. Yes.

Q. Where did you find that? A. That was in the third coupling, the fourth—

Q. You carried that personally? A. Yes, sir.

Q. Who brought the wire? A. Mr. Hicks.

Q. Where was Ed Pfeifer? A. Mr. Pfeifer was checking the couplings prior to the movement of placing the pump in the water.

Q. Is it your testimony in connection with this third pump that Ed Pfeifer had nothing to do with the assemblying of it or getting it operated? A. Not with the third pump, no, sir.

Q. Is it you testimony that the barge with the two pumps was sinking, still sinking? A. No, sir. Like I stated, I didn't know how much water was in the barge prior to the second pump being in place.

Q. Do you recall Ed Pfeifer calling you to have a leak and come down that night? [359] A. With one of the wires in the head fleet, yes, sir.

Mr. Murdoch: I'm sorry. I didn't hear the last answer.

The Witness: With the wire leading to one of the siphons in our head fleet.

By Mr. Libenson:

Q. What time was that? A. That was in the neighborhood of after 3 o'clock, between 3 and 4, 4:30 in that neighborhood.

Q. So then did you come down to the— A. No, sir. My electrician went down.

Q. Was that Tim Harriet? A. Offhand I couldn't exactly tell you which electrician was on watch at that particular turn.

Q. That wasn't in connection with this barge that you had the trouble with later, is that right? A. You mean the ones that the previous guns had been installed?

Q. Yes. A. No, sir.

Q. Did you hear Walter Tadder testify yesterday? A. No, sir.

Q. Did you hear Ed Pfeifer testify as to the number of pumps that was in this barge that was sinking? A. Not to the specified number but to installing [360] additional guns in the barge.

Q. Do you agree that he was injured at 4 o'clock? A. Only through Mr. Pfeifer's verbal statement.

Q. Did you see him after he was injured? A. As Mr. Pfeifer delivered the mail, like I specified before at 6:00 a.m.

Q. You have a specific recollection of being in your office and seeing him? A. Yes, sir, because we do have our reports in conjuction with the landing to send the main office at that particular time.

Q. Mr. Haddix, I'm not asking you about your general procedures or ordinary procedures. I'm asking you if you personally saw Ed Pfeifer on January 13th, 1978 at 6 a.m. A. Yes, sir.

Q. Did you hear him testify that he dropped the reports off in your office and you weren't there and just kept on going to the dispensary? A. No, sir, not at 6 a.m. He did not go the dispensary.

Q. After the shift, he said he went to the— A. Like I said, the way I understood it the statement before was after the turn which would have been 8 a.m.

Q. Did you hear him testify that he did not see you when he turned his reports in? He just left them in your [361] office. A. There is a possibility that he did make the statement but I didn't catch it.

Mr. Libenson: If Your Honor please, I think you have Exhibit 4.

By Mr. Libenson:

Q. Mr. Haddix, who is W. J. Flaherty? A. That's the safety administrator.

Q. Did you discuss Mr. Pfeifer's injury with him after it occurred? A. No, sir.

Q. Did you help him fill out the employer's report of occupational injury, Plaintiff's Exhibit 1? That would be this document. Did you have any conversation with him before January 17th, 1978 which is the date of the report? A. I had no conversation with Mr. Flaherty whatsoever.

The Court: You say you had none?
The Witness: None.

By Mr. Libenson:

Q. Do you know where he received the information to make out this report? A. As I made the statement before, whenever one of our employees go the the dispensary, there is a slip sent to our office and we do make

out a follow-up report on it which [362] is sent back to the superintendent's office. In turn, it goes to the safety department which Mr. Flaherty is in charge of.

Q. I show you Plaintiff's Exhibit 4 which is a medical case record and who is it looks like J. Joyce. Do you know who that is? A. No, I don't.

Q. You don't recognize his handwriting either, do you? A. That looks like one of your dispensary slips that's sent down which in turn in reference to the safety card we make out in conjunction with this.

Q. I show you Plaintiff's Exhibit 3 which consists of two pages and the foreman's signature is S. Haddix. Is that your signature? A. Yes.

Q. Did you make out this report? A. Yes, sir.

Q. Isn't it true in this report that you said the day of the accident was January 13th, 1978 on the 12 to 8 turn? A. Yes, sir.

Q. And he reported it on—He showed that his neck and tailbone and back were the parts injured? A. Yes, sir.

Q. And it says here in No. 16, "What job was being done?".

What did you write there? A. [363] A. "Checking and pumping barges."

Q. No. 17 it says accident sequence, location of accident. What happened? Accident type and what contacted the man. what did you write there? A. Stepping on ice and fell striking tailbone on rail of barge.

Q. There's nothing mentioned there about knuckles, is there? A. No, sir. The way this form is made out, if I may, is through the card that's sent down which in a sense we more or less copy off of it and put our comment in effect to it.

Q. There's absolutely no statement there concerning knuckles, wenches or any of the other types of equipment you discussed on your direct examination, is that correct? A. No, sir.

Q. But this is your report and this is dated January 15th, 1978, is that correct? A. Yes, sir.

Q. Two days after the accident? A. Yes, sir.

Q. The other part of the report reads "unsafe act or practice".

The Court: You had there none, is that correct?

A. Yes, sir.

Q. Then you said, "Injured man or other man [364] contributing factor" then you put in parentheses "not putting salt on icy barges," is that correct? A. Yes, sir.

Q. Is it your instructions that salt is to be put on icy barges? A. Like I stated before, the salt is to be put onto the landing at the personnel's discretion. If they feel that the barges are unsafe to walk on if it involves ice, snow or whatever, we leave ir more or less to the man's own better judgment.

Q. You heard Mr. Curran testify this morning, did you not? A. Yes, sir.

Q. Did you hear him say that they do not put salt on the gunnels of barges? A. Yes, I did.

Q. That's not consistent with this statement, is it? A. No, sir.

Q. And you do do that, don't you? A. Yes, sir.

Q. And you instruct the men to do that? A. Prior to the incident that is before winter sets in, we do give the men instructions to follow through pertaining to the weather that's coming up.

Q. As a matter of fact, your report further says [365] "unsafe conditions job continuing factor". What have you written there? A. Ice on gunnel of barges.

Q. The last time the job was performed by the injured employee I think you put one in there. A. 1/10/78.

Q. How often performed by the injured employee? A. Daily.

Q. And then you have a statement here foreman's action to prevent similar accident. List actions and star those already taken.

What did you write in there? A. "Instructed all river crew to salt gunnel and barges."

Q. Then you signed it? A. Yes, sir.

Q. And the superintendent signed it on the 26th, is that right? A. That's the assistant superintendent.

Q. This is the report that you prepared right after the accident, is that right? A. Well, after the report came from the dispensary, yes, sir.

Q. And did you say he stepped on ice and fell? A. Yes, sir.

[366] Q. You heard Mr. Curran testify this morning that there were three of this type of pump down at the No. 1, is that correct? A. Yes, sir.

Q. Were any of these pumps being used in any other barges that evening? A. The pump that was installed into the leaker?

Q. Other than the leaker. Let me rephrase the question.

On January 13th, 1978, were one or more of the available pumps, and I'm referring to the three I think we called them AC pumps, being used in any barge other than the barge we have called the leaking barge? A.

Well, the ones that was being used to replace the leaker barge, no but we did have other AC and DC plus steam siphon that we used in the head that was in operation.

Q. The steam siphon wasn't being used to pump out any of these barges, were they? A. Yes, sir. The head fleet. They are placed in the barges that are stationary that we do not normally move.

Q. You didn't have any leaking stationary barges that night, did you? A. Well, normally our head fleet barge consists of our older barges and they do off and on develop minor—

Q. But these steam siphons as you have called them [367] aren't available for the rest of the coupling of the fleet. A. In case of emergency, we have stretched rubber hose in conjunction to our steam line and used the steam siphons in our barges.

Q. Did you direct Mr. Tadder or Mr. Hicks or Pfeifer to use those steam siphons that night January 15th, 1978? A. No, sir.

Q. Were there other than the three AC pumps, were there any other pumps in operation at No. 1 landing that night? A. Only the other three that was placed in the other barge that was—

Q. Is it your testimony that all the pumps that were available were put into the leaking barge that night? A. No, sir.

Q. What other pumps were available? A. There was a total of seven heads, motors that was in the fleet and like I stated, six of them were being used. The other one was placed on the fleet at another point which I have no recollection of where it was placed at.

Q. Were the other six being used? A. Three in the head and three in the leaker.

Q. Three in the head, head fleet? A. Yes.

Q. What's that mean? A. That's our stationary barges which pumps are [368] installed and the pumps are left there.

Q. Are these other than the steam siphon you talked about? A. Yes, sir.

Q. But they were in operation at the stationary barges is that what you're saying? A. Only we needed— They are left in the barges and turned on when needed.

Q. They weren't moved that night though, were they? A. No, sir.

Q. Could they be moved? A. Yes, sir.

Q. How many pumps did you have being repaired that night do you know?

Mr. Murdoch: Objection, Your Honor. That's not relevant.

The Court: We'll overrule it. The witness can answer.

The Witness: That's Mr. Curran's end of it. The only thing that we have any bearing on at our landing personnel reports to us that they got a bad head and we instruct them to bring it to the office and Mr. Curran makes a repair order and sends it out.

By Mr. Libenson:

Q. Did you come back down to the fleet—when I say the fleet, the barges that are tied up at No. 1—after [369] 4 o'clock on January 13th, 1978? A. No, sir. After I left between 1 and 3, I felt that the barge was being sufficiently taken care of and my services were no longer needed.

Q. Did you talk to Walter Tadder after 4 o'clock that night? A. Only when Mr. Tadder came by the office towards the tail end of the turn.

Q. When you put in this third pump, Ed Pfeifer wasn't around at that point, was he? A. Mr. Pfeifer like I stated before was checking possibly where his barges would be that was in the lineup for the hoist.

Q. Did you see him? A. Yes, sir.

Q. Are you sure he wasn't in the pump house? A. No, sir.

Q. Do you know whether or not he was already hurt at that point? A. No, sir.

Q. You don't know? A. No, sir.

Q. Would the fact that he hadn't— Would the fact that he wasn't assisting you with this pump at that time refresh your recollection to the fact that he had already been [370] hurt? A. No, sir. If I was on the landing between 1 and 3 and he supposedly fell at 4, I don't see where it would be possible.

Q. Did you check your watch on that? A. Yes, sir.

Q. You made no note of that of course. A. No, sir. That's more or less of a daily routine. We do keep time of our general movements.

Q. Where did you get this information that he fell on a knuckle? A. Through Mr. Pfeifer himself.

Q. What time did you get that? A. At 6 o'clock in the morning.

Q. Was that by telephone? A. No, sir.

Q. You say you had a person-to-person meeting with him? A. That's when Mr. Pfeifer delivered the landing reports.

Q. You are aware, of course, that he has not testified to that set of facts? A. Like I made the statement before, I didn't catch all of Mr. Pfeifer's statement; only part of it yesterday.

Q. But your accident report shows that he slipped on the gunnel, is that right? [371] A. Like I stated on that too, it is made out through the dispensary's report.

Q. The one you signed— A. That's what I'm in reference to.

Q. If he told you one thing, why would you write something different on your accident report? A. Through the correspondence of the dispensary report. You try to make them in conjunction with what Mr. Pfeifer turned in to the dispensary.

Q. And the fact that you are now testifying to a different set of facts does not influence what you wrote on the date of the accident, is that your testimony? A. In reference to—

Q. The accident reports. A. In reference to the knuckle to the rail?

Q. Both. Everything. A. I don't understand.

Q. I'll rephrase it. You said, and you interrupt me if I'm misstating anything, as I understand the testimony, I think you testified that you made out this accident report to be consistent with or in conjunction with the medical report. A. Yes, sir.

Q. And you wrote up that "He slipped on a gunnel. He stepped on ice and fell striking his tailbone on the rail of a barge" notwithstanding the fact that you are now testifying [372] that he stopped in and saw you and told you he fell on a knucke? I think that's what you said. A. Yes, sir.

Q. Aren't you obliged to tell the company the truth when you write up this report? A. Only through the same thing that employees should be truthful in supplying a true accident report which we can follow through with it. The way you're stating I misinterpret the way he turned it in from the dispensary. That would be in a sense a false statement, wouldn't it?

Q. That's exactly why I'm asking you the question, Mr. Haddix. You're on the stand.

Q. Right, but in the same token though like I stated, I was only following through from the medical report itself which Mr. Pfeifer gave to the nurse.

Q. We'll let the Court decide. I don't have anything further.

When you were called about the electrician, you say you recall that, don't you? A. Yes, sir.

Q. Did Ed Pfeifer tell you why he needed an electrician? A. It was something to do with one of these siphoning cables or wires or extensions, whatever way you want to refer to it that had broke and needed fixed.

[373] Q. Did he tell you why it broke or what caused it to break? A. No, he didn't.

Q. Did he tell you that the barges had broken loose and that's what caused it to tear? A. No, sir.

Q. Is it your testimony that—Strike that.

As I have taken in your—my note is testimony as to whether he asked you for extra help is you don't have a recollection, is that correct?

Mr. Murdoch: I think that's a misstatement of facts, Your Honor.

The Court: We'll let him probe.

A. At the time there's a possibility I did make that statement, yes, sir.

Q. Did you meet with Mr. Murdoch before you came in here to testify? A. On today?

Q. Yes. A. I stopped in Mr. Murdoch's office to find out what it was about, yes, sir.

Q. Did you review your testimony with him? A. No, sir.

Q. How long were you with him? A. I'm working 12 to 8 and I stopped at Mr. Murdoch's [374] office at 9 a.m. yesterday morning.

Q. Is that the first time you ever met him? A. Yes, sir.

Q. First time you ever discussed this case with him? A. Yes, sir.

Q. Did you give a statement by telephone or any other means to anybody either from his office or from your employer?

Mr. Murdoch: Your Honor, I object to this line of questioning. I think this is something that could be handled through discovery and it's not pertinent to this case.

The Court: We'll let him probe on that point.

A. No, sir.

Mr. Libenson: I have nothing further of this witness.

Mr. Murdoch: I have a few questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Murdoch:

Q. Mr. Haddix, when you came into my office, were you coming in only to talk about this particular case? A. As far as I knew, yes, sir.

Q. Were you scheduled for a deposition today on another matter? A. Yes, sir.

Q. That I was to represent you to take you to? A. Yes, sir.

[375] Q. That had to be cancelled because you were here today? A. Yes, sir.

Q. And didn't we talk about that particular case when you came into my office? A. Yes, sir.

Q. You were asked questions about what happens if a barge is brought into the fleet and has ice on it and you stated in response to one of Mr. Libenson's questions that the work is done after the coupling. What do you mean by after coupling? A. Tying into the balance of the fleet, that is if the barge is accepted by the landing personnel.

Q. Whose responsibility would it be to clear the gunnels of the barge or the rake ins of the barge once it's in the fleet? A. Once it's in the fleet, the landing personnel.

Q. I believe you stated on direct examination in reference to making out the foreman's report of accidental injury which you signed did you state that some card is sent down to you as the foreman? A. Yes, sir, from the dispensary.

Q. And what information then do you put onto your particular report after you received that card? A. We follow through with the sequence of what the [376] individual states to the dispensary to the nurse and then

in turn like I stated there the unsafe act and what had been mentioned to the employee to prevent further incidents.

Q. You were also asked on cross examination as to whether or not you directed Mr. Pfeifer or anybody to use a particular pump and I think there might have been reference to a siphon pump. Do you—As the foreman, are you obligated to direct the headman as to every step that he should take on a given shift? A. No, sir. They normally are broke in with the original crew before they accept the job and responsibilities are there.

Mr. Murdoch: That's all, Your Honor.

Mr. Libenson: I have two or three other questions.

RECROSS EXAMINATION

By Mr. Libenson:

Q. This motor vessel Sidney Johnson what was the name of the captain that night? A. Eugene Slutsky, S-l-u-t-s-k-y.

Q. Do you know the name of the members of his crew? A. Only the one. It's Eugene's brother and his name is Norby.

Q. Did you go down and talk to them that night? A. Yes, sir.

Q. What time? [377] A. Between one and three.

Q. Were they sleeping any members of the crew? A. One deckhand. I couldn't verify that.

Q. You only saw one deckhand? A. One deckhand plus the pilot.

Q. So the testimony that there were two deckhands and a pilot available that night you only saw one, is that

right, one deckhand and one pilot? A. When the boat was tied in, it was not maneuvering barges.

Q. Isn't it true, Mr. Haddix, that these motor vessels stay on duty 24 hours a day?

> Mr. Murdoch: Your Honor, at this time I object to the line of questioning. It's beyond the scope of redirect.
>
> The Court: I agree. Sustained.
>
> Mr. Libenson: May I address the Court as to why? The testimony that they have tried to develop here is that there was more than one adequate number of people and I wish to show that the crew on these motor vessels stay on over 24 hours and they sleep during the night turn.
>
> The Court: His objection is that you're beyond the scope of the redirect with which I agree but I also have discretion so we'll let you pursue it.

By Mr. Libenson:

Q. Isn't it true that on these motor vessels that they [378] stay on over 24 hours a day? A. Yes, sir.

Q. Isn't it true that the crew sleeps on it? A. In the same token our landing personnel does the same thing whenever they do have—

Q. The crew of a motor vessel can't get off, is that right? A. Well, if they're not—

Q. If they're on duty. A. If they're not in the process of moving barges for our landing or wherever they're sent to for work, they are allowed to get off to, say, make a phone call on the shore or at the office, our office as far as that goes.

Q. Isn't it true in your experience that the crews on these motor vessels if they're going to sleep usually sleep

on the 12 to 8 turn? A. Well, not necessarily. It all depends on how many hours they worked prior to coming into the landing. Sometimes we do not only call them just out say for the 8 to 4 turn. We do call them in sometimes at 12 midnight and say they do stay awake the 12 to 8 turn and they do catnap then the 8 to 12 turn.

Q. The absence of one of the deckhands that you didn't account for could be that he was sleeping? A. There was a possibility. He could have been [379] checking out his engines and water systems and so forth.

Mr. Libenson: I have nothing further.

Mr. Murdoch: I have nothing further.

The Court: There were a couple points that I wanted to ask you about, Mr. Haddix. At one point you said it was your understanding or your belief I think that Mr. Pfeifer had fallen twice, is that right?

The Witness: Yes, sir.

The Court: On what did you base that belief?

The Witness: Through his co-workers made the statement he had fallen prior to me visiting the landing.

The Court: It's your belief assuming the accident report is correct he fell around 4 then you believe that he fell sometime between midnight and 1 and then sometime after you left at 3, is that what you're saying?

The Witness: Yes, sir.

The Court: Which fall was it that you understand he stepped on the knuckle?

The Witness: That was around 4 a.m., second time.

The Court: What did you understand—If anything what did you understand happened on the first fall?

The Witness: That more or less coming out of the pump boat and slipped on the gunnel and going down.

The Court: Do you recall whether there was any snow on the gunnels?

[380] The Witness: I'd say intermittently. Not fully. Just in spots.

The Court: Even though that water might warm up the air in bulkheads, it still wouldn't melt the snow on contact?

The Witness: Well, you have a combination there, Your Honor. They tell me—I'm no chemist. They do tell me with the cold and the water solution mixing there is a possibility you do have a mild acid, sulphuric acid throwoff and water will not freeze whenever you have that solution and it does create heat.

The Court: Did that engender any more questions on your part?

Mr. Murdoch: I have nothing more.

Mr. Libenson: I have two questions.

RECROSS EXAMINATION

By Mr. Libenson:

Q. Which co-worker told you that he fell earlier? A. I can't say for sure but I think it was Mr. Tadder.

Q. Did he tell you where he fell and what part? A. It was on the barge next to the pump boat.

Q. Was it a serious fall? A. Well, not to my knowledge because there was a little bit of laughing to it even from Mr. Pfeifer.

Q. He continued to work that night? A. Yes, sir.

[381] Q. But the fall was a slip, is that correct, as you were told? A. As far as I was told, yes.

Q. And is Mr. Pfeifer considered a good worker? A. Yes, sir.

Q. An experienced riverman? A. Yes, sir.

Mr. Murdoch: Your Honor, again we're far beyond the scope.

The Court: We'll sustain the objection.

Q. There's been testimony in this case there were three instances or four instances of snow on the gunnel of the barge he fell on and is that correct?

Mr. Murdoch: Your Honor, I object to that question because I think that's a misstatement of the testimony.

The Court: I think Mr. Pfeifer testified to that.

Mr. Libenson: So do I.

A. Three to four inches in reference to the fleet? I'd have to disagree with that. In the coal hopper it's where it does not generate as much heat like I stated before of the gunnel and so forth that there might have been the possibility of that much snow but on the gunnels, no.

Q. Was there snow on all the barges that night? A. Just like I stated before in spots. Some places [382] wet without snow.

Q. Is that because they came in at different times? A. No, sir.

Q. Do you know what causes that? A. Just like I made the statement before only through hearsay but like I said, I'm no chemist.

Q. Have you in your time on the J & L, have you used or seen shovels being used to shovel snow off the gunnels?

Mr. Murdoch: Your Honor, again it's beyond the scope of direct.

The Court: We'll sustain it.

Mr. Libenson: I have nothing further.

The Court: Thank you, sir.

(Witness excused.)

The Court: Do you want to take a break now or will your next witness be fairly long?

Mr. Murdoch: No. He'll be fairly long.

The Court: We'll take a recess until 3 o'clock.

(Court was thereupon recessed at 2:50 p.m. After the recess, the following proceedings were held commencing at 3:05 p.m.)

Mr. Murdoch: Off the record.

(There was an off the record discussion.)

[383] The Court: This had been listed on my trial list as a jury trial and somewhere along the line counsel had agreed that it would go non-jury and I said that was alright as far as I was concerned. We have, of course, been proceeding as a non-jury trial at this time, I'd ask the plaintiff if my statement is correct and if he will stipulate that this is to be a non-jury.

Mr. Libenson: We have agreed that this is to go non-jury.

The Court: You agree with that?

Mr. Murdoch: Yes, Your Honor.

The Court: You may call your next witness.

Transcript of Proceedings, October 30, 1980.

WARREN D. McCULLOUGH called as a witness by the defendant, first being duly sworn, testified as follows:

Mr. Libenson: If it please the Court, I'd like an offer on this witness.

The Court: Do you want that at side bar?

Mr. Libenson: Maybe. There's no jury.

(At side bar.)

Mr. Murdoch: Your Honor, at this time, Mr. McCullough—it may not be accurate—is a turn foreman. He's general foreman I believe replacing Dave Curran down at the works. Some of his testimony would be repetitious in regard to the policy of Jones & Laughlin when they call in [384] additional help. In his present position, he's custodian of the records of the By-products and I plan to introduce not as an exhibit but have him refer to the landing report which was kept by Mr. Pfeifer on January the 13th, 1978 which also incorporates what was there on the previous turn to show that there is no reference to any barge No. 1011 or is there any reference to Barge 1384.

Secondly, and this is signed by Mr. Pfeifer and I would have Mr. McCullough, of course, explain wnat information is to go on there and that it is the headman's responsibility to do that. Also I would have him refer without introducing into evidence the production records for the turn of 12 to 8 on January 13th, 1978 to show that this was not a busy night as far as production. In fact, it was less than a busy night and he will testify from his own personal knowledge and other pro-

duction records in that same period as to what is normally done on a particular turn.

Mr. Libenson: These documents were not displayed or shown at any discovery or pretrial and I think between the motions for production and the interrogatories that were definitely sought and I object to their being introduced or used in this trial at this late stage.

Mr. Murdoch: Your Honor, at this time I'd ask Mr. Libenson in the motion for production where specifically requested these records. At no time were we requested to state [385] what any records were as far as what were used in the By-Products.

The Court: To save time, I'd say let's let them in and if you can point to something, I'll hear arguments about it at some other time if you can find something.

Mr. Libenson: I think Mr. Murdoch is correct. He never showed them to us.

Mr. Murdoch: I'm not taking the position that I did. I didn't look.

The Court: Let's go ahead and let them in and I'll be willing to hear arguments on why they should be kept out if you want to.

Mr. Libenson: Okay.

(In open court.)

DIRECT EXAMINATION

By Mr. Murdoch:

Q. State your full name, please. A. Warren D. McCullough.

Q. Where do you reside, Mr. McCullough? A. 1827 Realty Avenue in the Beechview section of Pittsburgh.

Q. Are you married, sir? A. Yes, sir.

Q. Who do you reside with at that address? A. My wife and two children.

[386] Q. How old are they? A. My oldest is 12 going on 13 and my youngest is 11.

Q. Mr. McCullough, by whom are you presently employed? A. Jones & Laughlin Steel Corporation.

Mr. Murdoch: Your Honor, may I interrupt at this point and time? There is one other aspect of Mr. McCullough's testimony which does not border on these.

The Court: Why don't you tell him and if you want to put it on the record—

Mr. Murdoch: I did mention it to him before as far as job availability for Mr. Pfeifer.

Mr. Libenson: Well, if he's being—Again I'd object to that because if that's coming in in the nature of expert testimony, then again we would need a report.

The Court: We'll see what that is. Object if you want to at the time we begin to that testimony.

Mr. Libenson: Let me just put on the record an objection to his testimony in toto. Would that suffice rather than—

The Court: I'm really not sure. That's a little vague.

Mr. Murdoch: I can be more specific.

Mr. Libenson: I'll object as he testifies.

The Court: Let's wait and let him object as we go along.

[387] By Mr. Murdoch:

Q. How long have you been employed by Jones & Laughlin? A. 17 years.

Q. What is your present job classification? A. Supervisor Coal Handling.

Q. How long have you held that position? A. Approximately three years.

Q. You held that position then in January 1978? A. No, sir. I took over that department in February '78.

Q. What was your job title in January 1978? A. General labor foreman and pool coordinator.

Q. What does your present duties encompass as far as your present job? A. My present job encompasses both the belt line and river line. It's my responsibility that the whole entire operation on a 24-hour hasis. I also have accountability for the cost in that department as well as scheduling.

Q. Who did you replace when you took over this job? A. Mr. Curran.

Q. Who is now the battery foreman? A. Yes, sir.

Q. What were your duties on January 13th of 1978? A. I was general labor foreman/pool coordinator.

[388] The Court: General labor foreman and what?

The Witness: Pool coordinator.

By Mr. Murdoch:

Q. What specifically were those duties that you had in that job in January of '78? A. I was general labor foreman. I had the labor department which encompassed scheduling certain amounts of labor within the labor department. Also in my jurisdiction I had a track crew that did repair work on the tracks within the By-Products De-

partment. I also supervised the 745 high life machineries as well as the tractor drivers within the department.

Q. At that time, and I'm talking about January '78, did you have any responsibility or duties regarding equipment for use at Landing 1? A. No, sir.

Q. That would have been strictly Mr. Curran at that time? A. Unless he requested a 745 high lift.

Q. What other jobs have you held in your 17 years with Jones & Laughlin? A. I started out at J & L in 1963 as a secretary for the superintendent of the open hearth. From there was promoted to a hot top foreman in the open hearth department. From there I proceeded in the accounting department at South [389] Side Polishing Mill. I held the title of senior cost accountant for the South Side Polishing Mill and was promoted to the By-product shipper in the By-product Department to general labor foreman/pool coordinator to my subsequent promotion to Supervisor/Coal Handling.

Q. When did you get promoted to the job you held in January '78? A. When?

Q. Yes, sir. A. I'm not too sure which year but roughly around 1973.

Q. Would it be fair to say then you have been working at or about Landing No. 1 since 1973? A. Landing 1?

Q. Yes. A. No, sir.

Q. The By-products in that position? A. I was in the By-products Department since 1969 in the By products Department.

Q. Were you aware of any company policy in January of 1978 as to—under what condition if any extra help would be called out to work?

Mr. Libenson: Objection. He wasn't in that department at that time and if there's a written

policy, I'd object to verbal testimony if there is a written policy.

[390] The Court: I think groundwork should be laid as to his knowledge of company policy with respect to Landing No. 1.

By Mr. Murdoch:

Q. In your job at By-products, would you have any reason to have knowledge of any policies which took place at Landing No. 1? A. In January?

Q. January of '78. I'm sorry. A. No, sir.

Q. You can't testify to that as of personal knowledge, is that correct? A. No, sir.

Q. In your present capacity, do you have any responsibility for any of the records which are kept either by By-products or Landing No. 1? A. Yes, sir.

Q. Can you tell me what your responsibilities are towards those records, to maintain them for future file? A. We maintain the originals and carbon copies. The originals are maintained at the main office and we keep the carbon copies down in the coal handling area.

Q. Would you be classified as a custodian of these records? A. Yes, sir.

[391] Q. Within the purview of your being custodian of the records, do you have under your or within your custody the landing reports that date back as far as January 12th and 13th of 1978? A. Yes, sir, I do.

Q. Can you tell me how these landing reports are kept and how they come into your hands as custodian? A. They are filed by date, the originals being filed up at the main office and they are dept for long periods of time. I have yet to go up to the main office to hunt through the records that they weren't there.

Q. Can you tell me do you have any personal or any knowledge as to what information is to be included on the landing reports? A. Landing reports, yes, sir. The landing reports encompass the number of barges within a fleet any one specific 24-hour period, the specific number of the barges, the specific types of coal of the barges as well as any incoming or outgoing type of total fleet or barges that come in that would also be noted on there as well as the barges that were emptied on 4 to 12 and 12 to 8 turn would also be noted on there.

Q. At my request, did you bring with you the landing report that would encompass the 12 to 8 shift on January 13th, 1978? A. Yes, sir, I did.

[392] Q. Will you look at that, please?

Mr. Libenson: If Your Honor please, I'd like to put on the record my objection to this document being discussed or introduced in evidence.

The Court: Very well and my ruling will be as stated at side bar. I'm going to admit it now and I'll rule on it after yuo have had an opportunity to discover—to study the proceedings.

By Mr. Murdoch:

Q. Do you have that in front of you? A. Yes, sir.

Mr. Libenson: May I look at it before he testifies to it? You have seen it.

Mr. Murdoch: Yes.

(Document was handed to Mr. Libenson.)

Mr. Libenson: If Your Honor please, I might put a further objection on the record.

Mr. Murdoch: It does encompass 12 to 8 on the 18th. Just for identification purposes, I'll mark this as Defendant's Exhibit D.

By Mr. Murdoch:

Q. Mr. McCullough, I'll hand you what's been marked as Defendant's Exhibit D and ask you what that is. A. That is the record of barges received for Landing 1 and 4 to 12, 8 turn.

[393] Q. What date appears on the top? A. The date is the date the report was initiated which was on the 4 to 12 turn on the 12th.

Q. Is there information contained on there for the 12 to 8 shift on January 13th? A. Yes, sir. The report is finalized and finished by the 12 to 8 landing man, that is, the report that's turned in normally at 6 a.m. in the morning.

Q. Are there names on the bottom of that report? A. Yes, sir.

Q. Can you tell me what those names are? A. The 4 to 12 shift landing man was Frank Naggy and the 12 to 8 landing man was H. E. Pfeifer.

Q. Is it the responsibility of the headman to fill those out on each of those two turns? A. Yes, sir.

Q. Does that what has been marked as Defendant's Exhibit D indicate what barge numbers were present in the fleet at barge Landing No. 1 on the date, the 4 to 12 shift on January 12th and the 12 to 8 shift on January 13th? A. Yes, sir.

Q. Will you look through there, Mr. McCullough, and let me know whether or not there's any indication on either of those shifts either barge No. 1011 was present or barge No. 1384? [394] A. Neither of these two barges are shown on this report.

Q. What type of records are kept which would determine the amount of coal which is hoisted or moved from

barges during a particular shift? A. That would be the Coal Handling operation sheet.

Q. Are these also called production records? A. Yes, sir.

Q. Do you have as custodian of the records under your control hospital documents from January 13th, 1978? A. Yes, sir, I do.

Q. Do you have them with you? A. Yes, sir.

Q. Will you look at the one for January 13th, 1978, please, on the 12 to 8 shift? For identity—

Mr. Murdoch: For identification purposes, Your Honor, I'd like to mark that as Defendant's Exhibit E.

The Court: What do you call it, tonnage report?

The Witness: It's the Coal Handling operation sheet.

By Mr. Murdoch:

Q. Does that indicate how many—You tell me what it indicates. Let Mr. Libenson look at it.

(Mr. Libenson did so.)

[395] By Mr. Murdoch:

Q. Mr. McCullough, in your experience in By-products, can you tell me what a normal range would be for tons of coal that would be lifted on a 12 to 8 shift?

Mr. Libenson: Excuse me. Objection. I don't think he testified as to being in charge of that at any time. At least I don't recall it.

The Court: It's my understanding he's been in charge since February of 1978, is that correct?

The Witness: Yes, sir.

Mr. Libenson: That would be after the accident. Then I'll make an objection that it's not competent or relevant.

The Court: Are you aware of any change in the manner of operation of Landing No. 1 and—

The Witness: No, sir.

The Court: We'll let him answer with respect to—I want you to speak as of the time you took over since January '78 not since then in answer to his questions.

The Witness: Yes, sir.

By Mr. Murdoch:

Q. What would be the normal number of tons lifted on a 12 to 8 shift? A. On a 12 to 8 shift?

Q. Yes, sir. [396] A. At full production?

Q. At similar production to what there—Yes. A. At full production of By-product meaning five battery operation batteries being pushed every 17 hours, the coal that is charged into the ovens is normally 16.1 to 17 tons of coal per charge; that we're able to get out 11.7 tons of coke depending on how much coal we're able to get into the oven. Based on full production, you would use 7,000 to 7500 coal 24—on a 24 hour basis.

Q. I would like you to look at the record for the production record that you have there which is Defendant's Exhibit E for identification purposes and ask you how many tons were moved and I'm using the term moved. I don't know what the proper term is, hoisted. What is the proper term? A. Hoisted.

Do you have a calculator available?

(A calculator was handed to the witness by Mr. Libenson.)

(Continuing) On the 12 to 8 turn on January 13th, 29 ton of coal was—2900 ton of coal was hoisted.

Q. Is there anyway you can determine whether that was at full capacity? A. No, sir, it was not at full capacity.

Mr. Libenson: Objection. I don't think that's responsive. He asked him if there was a way he could [397] determine it. I think he gave a conclusionary answer rather than how he determined it.

The Court: I may have missed it. Ask the question again.

Mr. Murdoch: Yes, sir.

By Mr. Murdoch:

Q. Can you determine from looking at that Defendant's Exhibit E whether or not it was operating at full battery? A. Based on the number of tonnages that you need for the ovens, it is not full production, no.

The Court: He just asked you if you could tell.

A. Could I tell based on this not knowing what the level of operation on the ovens is, no. Knowing the level of operation on the ovens, yes.

Q. Do you have anything in front of you to determine what level of operation was on the ovens? A. Just my knowledge.

Q. What is that based upon? A. At that time, we had one battery after operation—out of operation. There was also a miner's strike and we were at a reduced level of operation. I believe the ovens were on a 24 hours coking time with one less battery and we were not using 7,700 ton of coal to charge those batteries.

Q. Do you have that knowledge personally? A. Yes, sir.

[398] Q. Somebody didn't tell you this. A. No, sir.

Q. So then what was lifted or hoisted on that particular shift that Mr. Pfeifer was working is less than normal? A. Yes, sir.

Q. Mr. McCullough, do you have any responsibility in your present job regarding placing persons into different jobs? A. Not now. I did at one time.

Q. When was that? A. I was general labor foreman and more specifically labor pool coordinator.

Q. And that was as of when? A. Prior to February of '78 I held that job for four years.

Q. Were you present when Dr. ElAttar testified? A. Yes, sir.

Q. In your present capacity as turn supervisor or coal handler, do you have any knowledge as to the inner workings as far as jobs would be available within the By-products? A. In that I know the persons to contact, the pool coordinator.

Q. You heard Dr. ElAttar testify that he gave a return to work slip to Mr. Pfeifer as of I believe January 30th, [399] 1978.

Mr. Libenson: Excuse me, Your Honor. I think he said it was January 20th.

The Court: I think he gave it to him on the day—

Mr. Libenson: The day he was injured.

The Court: I think he gave it to him on the day he saw him.

Mr. Libenson: My recollection is, Your Honor, he gave him the slip to return about a week after the date he was injured and then the testimony went on after that.

The Court: The witness figured he'd be back to work by January 20th and he gave him a back to work slip on the day he saw him on the 13th as I understand it for return on the 20th and then as it turned out, he was not seen by Dr. Sherman until the 23rd because of the snow storm.

Mr. Murdoch: That's correct.

By Mr. Murdoch:

Q. To rephrase my question, were you aware from the testimony of Dr. ElAttar today that he felt at least that Mr. Pfeifer could return to work as of January 20th? A. Yes, sir.

Q. Do you know whether or not Mr. Pfeifer would have been eligible for and whether or not there would have been light duty work for him as of that date? [400] A. As of January 20th, I was the pool coordinator, yes, sir, there was light work available.

Q. Can you tell me what type of work that would have been? A. We have numerous janitorial departments that he would qualify for.

Q. What point or what class would those jobs be?

Mr. Libenson: If Your Honor please, I'm going to object to this entire line of testimony unless the witness can say that such a position was offered to him, to the plaintiff.

The Court: I think that's an issue who's responsible for obtaining the position whether the plaintiff has to go forward or whether the defendant has to go forward so we'll let the testimony in as to whether or not it was available and then we'll at some point attempt to decide whose responsibility it is to go forward.

By Mr. Murdoch:

Q. You may answer the question. A. Repeat the question, please.

Q. I believe you were talking about janitorial positions being available. What class or what point job is a janitorial position or do they vary? A. It's job class 2 in all cases.

Q. As of May 24th, 1979, do you know whether or not [401] Mr. Pfeifer would have been eligible for light duty work?

Mr. Libenson: What did you use?

Mr. Murdoch: May 24th, 1979.

Mr. Libenson: May I ask why you used that day?

The Witness: I was not coordinator at that time.

Mr. Murdoch: That's because when Dr. Novak certified he could do light duty work.

The Witness: I was not pool coordinator at that time so I can say honestly without checking with the person who was the pool coordinator I don't know.

Mr. Murdoch: You may cross examine.

CROSS EXAMINATION

By Mr. Libenson:

Q. Do you have any written literature on directives or memorandums from the company in writing that you hand to an employee who is injured and tell him of the availability of light duty? A. No, sir.

Q. Do you instruct the medical director, Dr. ElAttar, to send the employee to you to inquire about light duty? A. No, sir, I do not.

Q. How does one who is injured and working—who's injured and had been at working at full duty become available—be aware of light duty jobs? A. The normal procedure is once the medical department [402] gives their examination on an individual who has been injured and determined whether not he can or cannot go back to his normal job or if the medical evaluation doesn't make that determination, they send the employee back to the department indicating restrictions so imposed upon this employee. Normally the slip will come back no restrictions which means he can go back to his normal job. However, in a lot of cases an employee will come back with many restrictions listed and based on those restrictions, the pool coordinator will determine there's work available with those restrictions.

Q. So then is it your testimony that until the medical department issues a slip with restrictions or without restrictions there's absolutely no activity by the pool coordinator for further work assignment? A. There is no activity by the pool coordinator in any aspects until the employee shows up with a slip.

Q. With a slip? A. Yes, sir.

Q. And a slip is obtained from the medical department? A. That's a slip that comes over with the employee, yes, sir.

Q. Until that slip is handed to the employee, he has no way of knowing or there isn't light duty available. A. I can't answer that question.

Q. Who can? [403] A. I don't know, sir. All I know is the information is received by me from the employee that is signed by the medical department. Once an employee is off over five days whether it be due to injury or personal sickness, that individual must have a physical ex-

amination, a medical evaluation and we cannot literally put him back to work until we receive that medical slip.

Q. The employee can't come directly to you and say: I'd like to get light duty? A. Not unless he's been off.

Q. Without going to the medical— A. Right. After five days, he must go to the medical department.

Q. And do you send any memorandum or bulletins to the medical department and say: We have so many openings for light duty? A. No, sir.

Q. Is there any communication from your department to the medical to advise them of the light duty options? A. No, sir.

Q. So is it your impression then that the only way an employee who's injured and off more than five days can obtain light duty work is if the medical department recommends it and gives him a light duty slip and signed it to you? A. I would say they wouldn't normally recommend. They [404] make the department make that decision whether or not there's work available for him based upon the restrictions that the medical department give him.

Q. Is it happenstance in most cases whether or not an injured employee can obtain light duty? A. No, sir. Most of the time I get a medical slip from the employee who returns to work.

Q. But he returns to his regular job? A. Not always.

Q. How many restricted jobs do you have at J & L? A. I have quite a few janitorial jobs that are restricted. In my tenure of office, I had placed to work for light duty an employee that had an amputee of a leg.

Q. I appreciate that but that's not my question. My question is within the entire plant, how many of these

janitorial type Class 2 jobs are there? A. In the entire plant, I can't answer.

Q. Within your department. A. At that time, approximately 14.

Q. And are they filled on a regular basis by regular people? A. Normally, yes.

Q. How much turnover is there? A. Normally not too much.

Q. Pardon? [405] A. Normally not too much.

Q. Do you have one person a year? A. Yes. We have replacements—We have vacation replacements as well throughout the year.

Q. Would there be more than one opening a year? A. You have to bear one thing in mind, sir, that a job Class 2 in the labor pool doesn't have any effect on seniority because maybe an individual is working in a janitor's job with 30 years seniority. It doesn't make any difference whether I have an employee who comes in who only has five years seniority. Management has a right of assignment so I can literally pull a man off who's capable of doing other work even though he prefers to do janitorial job, I can pull him off and have him do other work.

Q. Do you do that? A. Yes, I have.

Q. Do you do that very often? A. On occasion I have.

Q. A man who's Class 7 can only be paid Class 2 if he's doing janitorial work? A. That's correct, sir.

Q. You say the turnover is only about one man a year? A. If you want to consider vacation replacement during the year, it's greater than that.

Q. If you have already put one man on a year, the fact [406] that there are three or four or five people who are injured and have light duty slips you still don't have jobs for them, is that right? A. Yes, sir, I do have jobs available.

Q. As janitors? A. Yes, sir. There are 14 janitorial jobs.

Q. Is this your practice? A. Yes, sir.

Q. Do you tell this to the medical director? A. No, sir.

Q. Then he doesn't know it's the practice. A. We don't deal with the medical directors.

Q. How does he know to send somebody for light duty? A. If he has any question whether there's work available, he refers it to the department.

The Court: I'm not sure I understand about this assignment. Let's take a hypothetical situation. Let's assume a man with 10 years seniority is given a light duty certificate so he's put in the janitorial service and the next day somebody with 15 years seniority is given a light duty certificate but there are no jobs now. Can he bump the one with the 10 years' seniority?

The Witness: No, sir, he cannot. That would be a determination who they would assign to that job.

The Court: You think the 10 year man is doing [407] all right and there are no other options then he'd have to go home and wait until there was another opening for light duty?

The Witness: Yes, sir. I would make the determination at the time. If all 14 janitorial jobs are filled by light duty and a 15th man came in, then I'd have to make a determination as to whether I had work available for him.

By Mr. Libenson:

Q. Is it a fair assumption, Mr. McCullough, that you do not have light duty work available at all times for all restricted—medically restricted personnel? A. I have light duty work available since my tenure at all times but again it's made on the restrictions given to me by the medical department. I'm not saying that every employee that comes to me with medical restrictions is given light duty work.

Q. I think you have answered it in reverse. A. If the restrictions don't warrant that he can do janitorial work, I'm not going to assign him that job.

Q. You cannot say to this Court that you have a job for every light duty person that is sent to you from— A. No, sir, I can't. It's all based upon the medical restrictions.

Q. Do you keep score of how many people you don't have jobs for as to how many you placed? A. No, sir, I don't keep no records. I know who is in [408] my department at a specific time.

Q. Do you have any recollection or any of your best estimation as to how many people you don't place as compared to how many you do? A. Not exactly. My recollection at the time—in four years I was pool coordinator, I can remember only four cases that I didn't have jobs available for.

Q. Do you recall—I think you said there was a strike during the period of December 1977 and 1978. A. Miners' strike.

Q. Isn't it true that there was coal brought into the plant by railroad and by truck in addition to barge at the same time? A. Yes, sir.

Q. Would that show up on this exhibit in front of you? A. If it was unloaded at the Coal Handling facility, yes, sir.

Q. Are there other places that it could be unloaded? A. Yes, sir, it could be unloaded up in the coal stock area.

Q. And that coal could find its way into these batteries? A. No, sir. The only way to get it into the battery is through the Coal Handling operation.

Q. What is that other coal used for? A. It's put on the ground for future use.

[409] Q. Is it eventually used? A. Eventually used and when it is used, it appears on this sheet whether received by truck or car.

Q. It does appear on the sheet? A. Yes, sir.

Q. But you say that there's no railroad or truck coal on those sheets that are in front of you? A. We unloaded no railroad cars. We loaded trucks on the 8 to 4 turn on January 13th.

Q. Does that show on that chart? A. Oh, yes, we loaded coal from the elevator, unloaded coal from the elevator and loaded trucks on that specific day on the 8 to 4 turn on January 13th. For instance, Barge 1010 which was a VSG which is a high volatile coal, we estimated it at 950 ton we loaded—

Q. That would have to come up the elevator? A. It came up through the elevator down through the boiler shoot into trucks and taken to stock.

Q. So it didn't go into the bins. A. No, sir.

Q. But it did go up— A. If it had gone in the bins, it would be so indicated on the sheet.

Q. Excuse me. I want to take a look at this.

(Mr. Libenson did so.)

[410] (Continuing) Where is the original of these two documents? A. They are filed in the main office building of the By-product Department.

Q. Is there any reason why you didn't bring in the original? A. No specific reason, no, sir.

Q. There's not the slip that the turn foreman hands to the landing headman and tells him what barges to move? A. No, sir. This is a report filled out by the landing man himself.

Q. But my question was, I don't know if you were here earlier, you heard Mr. Haddix say he either telephones down or sends a slip down to say what barges he wanted moved. A. The slip of paper he's talking about is not a form number. It's just a piece of scratch paper listing the types of coal he wants outside the elevator.

Q. And the order he wants them in? A. Yes, sir.

Q. But there's no form for that? A. No, sir.

Q. Would that refer to barge numbers or just type of coal? A. Just type of coal.

Q. Would it say how much coal? [411] A. No, sir. The foreman has his own words up there that tells him how many tons are in each barge.

Mr. Libenson: I have nothing further of this witness.

Mr. Murdoch: Just one question, Mr. McCullough.

REDIRECT EXAMINATION

By Mr. Murdoch:

Q. Have you ever received a return to work slip on an individual that has already been placed on disability pension? A. No, sir.

Mr. Murdoch: That's all, Your Honor.

RECROSS EXAMINATION

By Mr. Libenson:

Q. That's company policy, is it not? A. I don't know whether it's company policy or not, sir.

The Court: Was it your testimony that that first sheet you referred to, the landing report—

Mr. Libenson: Do you want me to pass that up to Your Honor?

The Court: Yes, if you would.

(Document was handed to the Court.)

Mr. Libenson: Is that the document or the other one?

The Court: I think this is the one I want.

The first column says "On hand six American." [412] Underneath that there are three columns and a whole lot of numbers. Are those the numbers—Are those the barge numbers?

The Witness: Yes, sir, they are the specific barge numbers by type of coal that's in the fleet as of 6 a.m.

The Court: And that's supposed to reflect every barge that's moored there, is that right?

The Witness: Yes, sir.

The Court: Even though it might have been a week, it would be on a week's worth of these reports?

The Witness: I would have a report for each and every day.

The Court: Okay. That's all.

Mr. Libenson: I have nothing further.

Mr. Murdoch: Your Honor, at this time I had not planned on but I will move for admission into evidence of Defendant's Exhibits D and E.

The Court: You had objected?

Mr. Libenson: I have objected to that, Your Honor. These are the documents—

The Court: We'll hold them and rule on that after we have heard the argument.

(Witness excused.)

Mr. Murdoch: Your Honor, at this time I would call Randy Pingree.

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[413] RANDY A. PINGREE called as a witness by the defendant, first being duly sworn, testified as follows:

Direct Examination

By Mr. Murdoch:

Q. Mr. Pingree, where do you reside? A. In the city of Pittsburgh, Squirrel Hill section.

Q. Are you married? A. Yes, sir.

Q. Do you have any children? A. No, sir.

Q. By whom are you presently employed? A. Jones & Laughlin Steel Corporation.

Q. What is your job occupation? A. I'm the Assistant Supervisor of Hourly Payroll.

Q. What does that mean as far as what duties you have to perform? A. Basically speaking it's coordinating the day-to-day activities in the Hourly Payroll Department. I supervise 29 payroll clerks who pay. We pay approximately 20,000 hourly payroll. They're not all the hourly employees of Jones & Laughlin Steel Corporation but a large percentage.

Q. How long have you held this position? A. Since July of 1979.

Q. In this position are you familiar with the hourly [414] rates for the different job classifications? A. Yes, sir.

Q. Do you work with these on a day-to-day basis? A. Yes, sir, every day.

Q. Are you familiar with the rates which are set forth in the union contracts as they come up for people in Mr. Pfeifer's job classification? A. Yes, sir.

Q. Mr. Pingree, you have heard Mr. McCullough testify, is that correct? A. Yes, sir.

Q. And you have heard him testify as to a job 2 classification as far as being a janitorial job. A. Yes, sir.

Q. Can you tell me or do you have with you what the hourly rates are for that position as of let's go back to January of 1978? A. Okay. I have it with me here.

Mr. Libenson: Before he testifies, I'd object to his testimony on the basis that there's been no job offer made and I think it's incompetent and irrelevant.

The Court: W'll include this in the postponed ruling on the other.

Mr. Murdoch: Thank you.

[415] By Mr. Murdoch:

Q. Do you have those same rates as a Class 2 position showing what they are as of today and projecting those into the future as far as the upcoming contract is concerned? A. I can give you the current rate in effect as of today.

Q. Will you do that first of all and let me know what the rate is for Class 2 position?

The Court: Excuse me. Do the rates change on August 1st each year under the present contract?

The Witness: Under the current contract, yes and in addition to that, there are cost of living changes which would occur November, February, May and August of each year also. The rates which are currently in effect would have went into effect on August 1st, 1980.

The Court: Okay. This is within that—We're still within the three months since August?

The Witness: Right. November 1st there will be a change in the cost of living.

By Mr. Murdoch:

Q. What is that present rate? A. As of August 1st, 1980, job Class 2 pays 82.985 per hour.

Mr. Libenson: Are you sure it's not 8.72?

The Witness: The 8.275 was effective on 5/1/1980. [416] Effective 8/1/1980 we're looking at the same sheet each job class will be adjusted by adding the cost of living adjustment effective 8/1 which would have been 26 cents.

Mr. Libenson: You moved it over to the next column?

The Witness: No, sir. This figure has already changed. It is now 8.985. This was developed prior to 8/1. At that point in time, the cost of living—

Mr. Libenson: I have the right numbers. I just haven't added them.

The Witness: By 26 cents.

The Court: Does that mean someone in job Class 2 would be making $8.98 an hour?

The Witness: Yes, sir.

By Mr. Murdoch:

Q. Did you do any calculations at my request regarding that figure into the future? A. Yes, sir.

Q. Can you tell me what you did? A. Takes that hourly rate, the 8.985 assuming a Monday thru Friday schedule 40 hours per week which would be a normal schedule, a weekly rate would be $359.40.

Q. All right, sir. A. Continue?

Q. Yes, sir. A. Going one step further 52 weeks per year would give [417] us $18,688.80.

Q. All right, sir. Did you do any further calculating? A. Yes. You had asked me to multiply that times 11 years.

Q. All right. Did you do that and will you tell me what the answer was? A. $205,576.80.

Q. Is that Class 2 position what we call an incentive position? A. No, sir.

Q. So you didn't calculate any incentive into that, is that right? A. No. Conceivably there may be a 10 cents additional per hour. There are some non-incentive jobs that if the company designates that if they want to—It's called an add-on bonus job actually being that the employee does not have an opportunity to make incentive provided he has five years service for each hour worked on that job he can get an additional 10 cents. Not all those jobs are the 10 cents kicked in. That's why I didn't include it here.

Q. Do you have in front of you what the hourly rate was for that Class 2 position as of January 1978? A. For job Class 2 January of 1978, it would be 6.215 per hour plus an additional 32 cents an hour which would be the cost of living.

[418] Mr. Libenson: What date was that?

Mr. Murdoch: January of '78.

By Mr. Murdoch:

Q. So if my math is—

The Court: Excuse me. Does that mean that it would have been 6.215 on August 1st, '77 and then you would have had two cost of living increases which would have brought it up to an additional 32 cents by January '78? Is that what you're saying?

The Witness: On August 1st, 1977, the cost of living rate was 25 cents an hour. On November 1st, 1977, the cost of living was 32 cents an hour.

The Court: Without bothering with the cost of living, without telling me what the cost of living was or anything, what was the hourly rate on January 13th?

The Witness: You would have the 6.215 plus 32 cents.

The Court: I get 653 and a half.

Mr. Murdoch: Yes, sir.

By Mr. Murdoch:

Q. I don't think I asked you to do any calculating on that, Mr. Pingree, but maybe we can impose upon Mr. Libenson for his calculator again.

What I would like you to do, Mr. Pingree, if that was the hourly rate as of January 1978 is to assume that an individual, Mr. Pfeifer, would be working that job at that pay [419] from that date up to today's date and would it be possible for you to let me know what the total amount of wages would be from January 20th, 1978 up until today?

Mr. Libenson: While he's doing that, Your Honor, and so it's consistent because obviously in my pretrial statement I have shown calculations, my calculations were throught the end of this year on the lost earnings and the future lost earnings were from that date forward. I didn't expect the case to be tried at this point. I ask for a ruling. I take it the lost earnings are to the date of trial and the future lost earnings are from the date of trial, is that correct?

The Court: I think that's correct. I'm sure there's precedent for it.

Mr. Murdoch: I can't answer it either, Your Honor.

Mr. Libenson: Then I would request that any interrogation of this witness be directed towards those dates and in my presentation to the Court which Mr. Murdoch says he has no objection to, I will make an appropriate adjustment.

The Court: I think he was asked to figure it from January 20th.

Mr. Murdoch: To the date of this trial.

Mr. Libenson: To November 1 and I just wanted to point out that my calculations have the two month gap and I want to make that change.

[420] The Court: Right, without waiving any objection to his testimony in any way.

The Witness: I think I'm done. If I'm correct in what I did, I started off with the 6.53, excuse me, 6.535 per hour times 40 hours gives us a weekly rate of $261.40 times 52 which would give us a yearly rate would be $13,592.80 times two years would be $27,185.660.

The Court: Excuse me. Did you get a yearly rate of 13,592.80?

The Witness: Yes, sir. Two years would be 27,185.60 then what I did for the balance of the time from October, this point in October to January, I assume we can consider that as nine months was 39 weeks. 39 weeks, the 261.40 would be 10,194.60 added to out $27,000.00 figure would be $37,380.20.

By Mr. Murdoch:

Q. We used 39 weeks because I had asked you to compute from January 20th? A. Right, so I sort of cheated a little bit by saying nine months, three quarters.

Q. That figure then would be what an individual would be working at Class 2 position from January 20th, 1978 up to the present time? A. It would be an approximate figure, yes, sir.

Q. Does that figure take into consideration any increases of contracts in Class 2 beyond the 6.535? [421] A. No, sir. Everything is based on that rate.

Q. Are you familiar with the Class 7 position which Mr. Pfeifer held in January of 1978 was an indirect incentive? A. I'm not familiar with that.

Q. That has been the testimony. Do you have any knowledge in your position as to or on what basis incentive payments are made? A. There's many, many different types of incentive plans. Some incentive plans are frequently related to an individual himself output. There are type of wage plans where there could be a group of people or some can be almost departmental type things where the output of 200 employees could determine how much incentive would be paid.

Q. Let's assume that when I use the term indirect incentive that it is a departmental type of incentive. A. Right. It's not directly related to producing steel, that type thing.

Q. In your personal knowledge, does that vary from shift to shift or turn to turn? A. Yes, based on what type of plans. There's some plans you get the same amount of money per pay period so in that case, you would say it varies from pay period anytime we're asked about incentive because it varies.

Q. Do you have any knowledge as to whether or not the position that Mr. Pfeifer held or other positions, similar [422] positions in the By-products area had what is called a vacation bonus payment? A. Vacation bonus is for all the hourly employees.

Q. What is vacation bonus and does that vary with employee? A. Vacation bonus is actually given to the employee for taking certain weeks vacation out of the year. That is only due to the employees that are eligible for regular vacation during that year, employees on the extended vacation or when people refer to it as 13 week people are not entitled to any kind of bonus for that particular year in which they're entitled to their 13 weeks but basically speaking if you take a summer month off, the company would not encourage you to take a summer month off because that's when everybody takes vacation. They would encourage an individual to take a winter month off and give him maybe $45.00 more for taking that particular week of vacation compared to taking it during the summer during the peak vacation season.

Q. Again that is an individual basis as far as who might get any bonus or the amount? A. The figures are

standard or all the employees. It depends when you actually take your vacation. That's the determining factor.

Mr. Murdoch: I have no further questions, Your Honor.

CROSS EXAMINATION

By Mr. Libenson:

Q. Mr. Pingree, did you have occasion to look at the calculations I made in my pretrial statement? A. Yes, sir.

Q. In the future lost earnings, you don't have it in front of you? A. No, sir.

Q. Let me show it to you. I have mentioned that the present union contract in a Class 7 job calls for an increase of 9.36, the effective rate of May 1, '80 to 9.61 on August 1, 1980 increased to—

The Court: Where are you reading?

Mr. Libenson: Excuse me, Your Honor. Page two of my supplemental pretrial statement, fourth paragraph down.

The Court: Did that come in just recently?

Mr. Libenson: It would have been with the weather report.

The Court: All right. Okay. Excuse me. Now I'm with you.

By Mr. Libenson:

Q. In there I made this statement. "The present union contract in a Class 7 job calls for an increase from 9.36 the effective rate as of May 1, 1980 to 9.61 on August 1, 1981, an increase of 25 cents an hour" and I said $520.00 per year and an [424] additional increase on August 1, 1982 to 9.81 of 20 cents an hour or $416.00

per year. There are additional cost of living adjustments effective August 1, 1981 and August 1, 1982."

Do we know what they are yet? A. No, sir. Actually that will be known the month before in July of '81 and July of '82.

Q. Have there been a consistent or an average amount to these cost of living adjustments over the past, say, five years? A. I can give you a little—I brought with me all the different cost of living increases.

> The Court: Are they tied in with the Bureau of Labor Statistics?
>
> The Witness: I believe that's the figure, yes, or Consumer Price Index perhaps. From May 1st, 1974, which was 15 cents an hour, it has gone all the way up to—Well, August of 1980 it's 26 cents and that is a three-month increase.

By Mr. Libenson:

Q. Every three months? A. Yes.

Q. So is that a dollar year? A. As of this point and time, it's over $3.00 that has been rolled in just due to cost of living increases.

Q. $3.00 per hour? A. Per hour.

[425] Q. And that's over a period of how many years? A. That is since 1975 for the last five years.

Q. And that's a gross figure that has been generated over five years? A. That has been rolled into the actual job—

Q. $3.00 an hour in five years? A. Yes.

Q. So if that continues in 10 years, can you say that at the tenth year there would be $6.00 an hour? A. I can't—

Q. Based on these figures.

Mr. Murdoch: Your Honor, I object. I think he's testified he's not qualified.

The Court: You have to listen to campaign rhetoric and decide what the future will say.

The Witness: I can only say what's in effect and what has happened.

By Mr. Libenson:

Q. You say it's been $3.00 in five years. How much is that in a year? A. It's $1.67 a year.

Q. This has been a continuing phenomenon, is that right? A. Yes, sir.

Q. In addition to the figures that I read to you and based on previous cost of living experience, there has been a [426] dollar .67 per year, is that right? A. Correct.

Q. And—

The Court: I had understood you to say $3.00 in five years.

The Witness: It would be 60 cents a year, yes.

By Mr. Libenson:

Q. It would be 60 cents per year and looking ahead for a period of 11 years assuming the same average increase, what would that mean in dollars per year? A. 60 cents times 11 years.

Q. Wouldn't it be 60 cents the first year and $1.20 the second year and $1.80 the third year? A. Adding?

Q. Adding. A. It would be 6.60. 60 times 11 is 6.60.

Q. The last year. How many hours a year are there that the average man works in this field? Is it 2,000 hours? A. 2,000. If you work 40 hours a week times 52 is 2,080 or something thereabouts.

Q. In addition to the figures that I have shown here which are under the existing contract, can you calculate how much additional wages would be paid under the cost of living for the next 11 years at the rate of 60 cents per hour per year with an accumulation every year?

[427] Mr. Murdoch: Your Honor, I object as being speculation. I don't think—

The Court: I think we're getting into, aren't we, whatever the name of that Supreme Court case was on damages?

Mr. Libenson: Liepold.

The Court: Is that what you're getting into?

Mr. Libenson: Yes, sir.

The Court: I would suggest—It's purely a mechanical function to figure out what this is and I would think that—What I think we should do is let him figure it out and submit an amended—supplemental amendment to your supplemental pretrial statement then when I get around to ruling on what we're going to apply here—

Mr. Libenson: I wanted to develop how much the cost of living has been and I think we have that on the record at this point and if the Court will permit me to utilize it, I won't bother.

The Court: You can utilize it. I'm not promising that the Court will.

Mr. Libenson: Maybe I was a little overstating more than I had here.

I have nothing further from this witness.

Mr. Murdoch: Just one question, Mr. Pingree.

[428] REDIRECT EXAMINATION

By Mr. Murdoch:

Q. Was that cost of living at 66 cents an hour included in your calculation for an 11 year for a Class 2 job position? A. That would have been all the cost of living. That's the current rate which includes the cost of living that had been accumulated in the job class rate.

The Court: Up until today?

The Witness: Yes, sir.

Mr. Murdoch: That's all I have.

The Court: Thank you, sir.

(Witness excused.)

The Court: You've got Dr. Enriquez?

Mr. Murdoch: Yes, and one of my associates was calling today trying to find out when we can schedule his disposition and I called and he was out.

The Court: If it would be any easier for everybody, I could certainly carve out a time where we could take his testimony as opposed to a deposition if you're not talking more than an hour or two.

Mr. Murdoch: We wouldn't be but I think he works at Harmarville and he's quite busy and I had my associate talking to him on the basis we would try to accommodate him so perhaps if I can check back with the Court after I talk with my associate—

[429] Mr. Libenson: My offer was that he would let his report in and I'm still willing to do that but I would much prefer having him in court if he's going to testify because there may be obliga-

tions and so forth and we may just double up the work without really getting any benefit out of it.

The Court: Off the record.

(There was an off the record discussion.)

Mr. Murdoch: I do have one other thing. As you know, Your Honor, even in the answer to the Complaint we had raised the fact that we had been continuing to make payments to Mr. Pfeifer under the Longshoremen's and Harborworkers' Act and he has readily admitted that when he testified. I have requested a letter from Hartford to show the exact amount but I didn't talk with him today. There is a check due tomorrow to Mr. Pfeifer and I would like to place on the record at this time and then supplement it with the letter as a setoff for any amount that might be awarded plaintiff and the payments as of October 31st, 1980 would be $33,709.14.

Mr. Libenson: Is that limited to compensation payments only without regard to medical—

Mr. Murdoch: Yes. I assume that I'll clarify that if it's not. It's my understanding that's solely Longshoremen's and Harborworker's compensation payments.

The Court: Would you give me the that figure again?

Mr. Murdoch: Yes, sir. 33,709.14.

[430] The Court: That includes tomorrow's check?

Mr. Murdoch: Yes.

The Court: So you rest with the exception of Dr. Enriquez?

Mr. Murdoch: That's correct.

The Court: Do you have rebuttal?

Mr. Libenson: Yes, Your Honor, and I also wanted to read in the record my damages but I'd like to get the witnesses on first if that's all right with you.

WALTER TADDER called as a witness by the plaintiff in rebuttal, having previously been sworn, testified further as follows:

Direct Examination

By Mr. Libenson:

Q. Walter, you heard Mr. Haddix testify this afternoon, did you not, or this morning? A. Yes, sir, I did.

Q. And the number of pumps in this sinking barge there was one. Everyone agrees that there was a pump in the gunnel in operation when you started on the turn, is that correct? A. Right.

Q. Who put in the second pump in the bulkhead? A. I did. Sherman Haddix said it right here. We put the second one in me and Haddix and the colored fellow.

Q. On the third one? [431] A. Right, because he wasn't sure it was going to hold.

Q. Did Sherman Haddix work on the second pump? A. No.

Q. Was he present when the second pump was put in? A. No.

Q. Did Eddie Pfeifer get injured carrying the motor for the second pump? A. A second pump, no. He was involved in the second pump. The first pump I put in the barge.

Q. Let's start again. When I say the second pump, I mean— A. The one I put in.

The Court: Excuse me. When you went to work, there was already one in.

The Witness: Go ahead. I understand.

By Mr. Libenson:

Q. As you worked, you noticed that this particular barge was leaking, is that correct? A. Right.

Q. It was sinking? A. Right.

Q. Was Eddie Pfeifer and you and Hicks working to put a pump in the bulkhead? A. Yes.

Q. There was no other pump in the bulkhead at that time? A. No.

[432] Q. When Eddie Pfeifer was carrying the motor part of that pump to the sinking barge, is that when he fell? A. Right.

The Court: We'll call that the second pump.

By Mr. Libenson:

Q. We'll call that the second pump, is that right? A. No, two pumps.

Q. And that's the pump that was put together by you and Hicks, is that correct? A. Right.

Q. Was Sherman Haddix on the fleet at that time? A. No, not that I seen.

Q. Did he assist you in putting in that pump? A. No.

Q. Was Eddie Pfeifer injured just before that pump was inserted? A. Yes.

Q. Did he go to the pump house after that? A. Right.

Q. Did you see Sherman Haddix down on the fleet after that? A. Yes.

Q. What was the circumstances that he came down after that? A. Took him and showed the barge that was sinking.

[433] Q. Who did? A. I was with him and Hicks.

Q. Where was Mr. Haddix? A. He was in the office in the pump barge.

Q. Was there a third pump put in the bulkhead of this sinking barge? A. Yes. The boss said we'd better put another one in because he wasn't sure.

Q. Who was the boss? A. Sherman Haddix assisted us.

Q. Was this after Mr. Pfeifer was injured? A. Right.

Q. Is that why Mr. Pfeifer wasn't working with you at that time? A. Yes.

Q. Did Haddix have anything at all to do with putting together and getting the second pump working? A. Yes, he helped.

Q. The second pump? A. No, not the second pump. That was me and Pfeifer and the other fellow.

Q. Had you told Mr. Haddix that Pfeifer had fallen earlier that night? A. Yes, in front of the pump house by the door.

Q. What kind of a fall was it? [434] A. Just a little one but he grabbed hold on the door. He broke the fall. He was on the door.

Q. When you say— A. Opened the door to go out.

Q. He had nothing in his hands? A. No. He was holding on the door. He didn't fall forward, just down and caught himself on the doors.

Q. Did his feet touch the ground or did his feet go out from under him? A. No, nothing like that.

Mr. Murdoch: Your Honor, this really isn't rebuttal. He's agreeing with what the testimony is. My understanding that rebuttal is to rebut that testimony.

The Court: We'll sustain the objection. I think that's correct.

By Mr. Libenson:

Q. Did you see any deckhands on the motor vessel that you were working with at night? A. Not when I went up, no.

Q. Did you see the captain? A. Yes.

Q. Did you at anytime tell Sherman Haddix that Ed Pfeifer had injured himself? A. I told him when I was going up to change lockers that he fell down and that was it.

[435] Q. What time was that? A. About 8 o'clock when I was leaving the dock around 7:30, quarter of eight when I was going over to the locker room.

Q. Did you tell him where he fell? A. No. I just said he slipped.

Q. Did he ask you where? A. No.

Q. Did you ever tell him he fell on a knuckle? A. No, nothing like that.

Mr. Libenson: I have nothing further.

CROSS EXAMINATION

By Mr. Murdoch:

Q. Mr. Tadder, what time did Mr. Haddix come out when you were working on the third pump? A. I don't know to tell you the truth. I don't keep a watch down there.

Q. Is there any way you can tell me in reference to the time that Mr. Pfeifer fell how long afterwards he came out on the third pump? A. It was late. I know that.

Q. What do you mean by late? A. Maybe three, maybe before. I can't tell you what time because I didn't have a watch. I was out there working with the man.

[436] Q. Could it have been a half hour from the time Mr. Pfeifer fell? A. I can't say to tell you the truth.

Q. Could it have been as early as 3 o'clock? A. I don't know to tell you the truth.

Q. How long was Mr. Haddix out on the barge working with you? A. We made sure the barge was going to come up. We stayed there a little bit me and him in case he needed assistance and he went back to the pump boat.

Q. Can you estimate the time that Mr. Haddix stayed on the landing? A. With me?

Q. Yes, sir. A. Maybe 15, 20 minutes then he walked away. He said it looked like it's coming.

Q. Was Mr. Hicks with you at that time? A. He was there, yes, then I told him go ahead out might as well. We don't need all the men out there now.

Q. Was there any reason you didn't mention to Mr. Haddix while he was out on the barge while you were working on No. 3 pump that Mr. Pfeifer had fallen and had gone to the pump boat? A. I didn't think about it. I was just thinking about saving that barge. That's the main thing. I didn't want to [437] lose the barge.

Q. What was the reason you mentioned it to Mr. Haddix at 8 o'clock? A. Me?

Q. Yes, sir. A. It was before 8. I told him Eddie Pfeifer fell down and that was all and I went. I told him Eddie Pfeifer fell down and I walked out the steps and over to the locker room.

Q. Was there any reason you mentioned to him at that time? A. So he'd know where the man was. If you don't see him pick his card up, he might have fell in the river or something. This way he knew he was up at the

dispensary. We pick our cards up over at the office and if that man don't pick his card out, he'll be out on the fleet.

The Court: Are you saying card?

The Witness: Timecard. We keep them in the office.

Mr. Murdoch: That's all I have, Your Honor.

The Court: Thank you, Mr. Tadden.

The Witness: You're welcome.

(Witness stepped down.)

HOWARD E. PFEIFER the plaintiff, being recalled as a witness in rebuttal, having previously been duly sworn, testified further as follows:

The Court: You're likewise still under oath, [438] Mr. Pfeifer.

The Witness: Yes, sir.

DIRECT EXAMINATION

By Mr. Libenson:

Q. Howard, was Sherman Haddix present when you were carrying this electric motor which was assembled into the pump? A. No, sir.

Q. Was this the second pump that was put in the sinking barge? A. It was the first one we put into the bulkhead but it was the second pump into the barge.

Q. And after you were injured, after you fell and after you held the flashlight to have that pump moving, what did you do? A. After we had the pump all gone, I got off the barge that was sinking and went back up to the pump boat.

Q. Did you come out of the pump boat at anytime after that until you left the turn? A. I come out to take the mail to the lower landing and to the office is the only time I was out.

Q. Did you have any conversation face to face with Sherman Haddix the evening after you were injured?

> Mr. Murdoch: Your Honor, I think this is something that was covered on direct examination. It's certainly not rebuttal testimony regarding any conversations face to face.
>
> [439] The Court: I think there was some question whether it was by telephone or face to face.
>
> Mr. Libenson: If Your Honor please, Mr. Haddix testified this man took the report and handed it to him personally at 6 a.m. If he will stipulate—I'm not going to be smart, Your Honor. I'll just go ahead.

By Mr. Libenson:

Q. Did you have any conversation at 6 o'clock on January 13th, 1978 face to face with Sherman Haddix? A. No, sir.

Q. When you took your reports up, was he in his office? A. No, sir. He was on the belt somewhere I presume.

Q. Did you just leave them there? A. Laid them on the desk and went on down to the pump boat.

Q. How did you communicate your injury to him? A. I called him on the telephone.

Q. Where did you call him from? A. From the landing to the Coal Handling office.

Q. What time did you do that? A. Somewhere right around 7.

Q. Did you tell him that you fell on a knuckle? A. No, sir.

Q. Where did you tell him you fell? A. I fell on the gunnel.

[440] Q. Did you ever tell him you fell on a knuckle? A. No, sir.

Q. Did Dr. ElAttar ever give you a light duty slip? A. No, sir.

Q. Did he ever recommend that you have a light duty slip? A. No, sir.

Q. Did you ever refuse a light duty slip? A. No, sir.

Q. Are you aware that J & L had a light duty job available for you? A. No, sir, I was not.

Q. Did you ever refuse a light duty job at J & L? A. No, sir.

Q. Did you have any objection to working as a janitor? A. No, sir.

Q. Did they ever offer you a job? A. No, sir.

Q. Did you see the motor vessel the night that you were injured? A. Yes, sir.

Q. Did you see anyone—Did you see any deckhands on it? A. No, sir.

Q. Could there have been deckhands on it? [441] A. There could have been back in the other part but there was none out on the deck where the work was to be.

Q. Did any of the deckhands assist you or any of your own people the night you were injured? A. No, sir.

Q. The captain did? A. The captain did, the captain operated and took orders and tried to work with us.

Q. Have you ever received any instructions from anyone at J & L that you had the authority to order the motor vessel to pick up salt and bring it to the landing? A. No, sir.

Q. Have you ever seen it done that way? A. No, sir.

Mr. Libenson: I have nothing.

Mr. Murdoch: I have nothing, Your Honor.

The Court: Thank you, sir.

(Witness excused.)

The Court: I will be—Just so you know, I will be asking for proposed findings of fact and conclusions of law pursuant to Rule I think it's 52 the one that requires to make specific findings of fact and conclusions of law in a non-jury trial so just so you're—

Mr. Libenson: If Your Honor please, I would like to read into the record the lost earnings.

[442] The Court: Very well. Before you do that—

(Pause)

Mr. Libenson: May I proceed, Your Honor?

For the years 1978, '79 and 1980, the lost earnings we have calculated—We have been given by the defendant the earnings of the person next lower in seniority to Howard Pfeifer and we have the earnings next higher in seniority of Howard Pfeifer and we have used the mean or the average between those two numbers as our lost earnings for the periods shown. For '78, the higher earnings were $26,484.00. The lower earnings were 22,587 and the average is 24,535. For 1979, the average were 27,296, the higher one. The lower was 25,783. The average is $26,539.00. For the year 1980, the higher earnings are 36,686. The lower is 30,758 and the average is $33,722.00.

For the lost earnings, I added three years 1978, '79 and '80 which totaled $84,796.00 and deducted the actual earnings for the year 1978 which were $1530.00 which left a total of $83,266.00. However, in view of the fact that we are trying the case as of this date, I have taken four pay periods off of that pay period is every two weeks. There's 26 pay periods a year which comes to $5,188.00, therefore, the lost earnings to November 1, 1980 are $78,078.00.

On the future lost earnings, the $33,722.00 is the—

The Court: Excuse me.

Mr. Libenson: —1980 rate.

[443] The Court: Going back to—You're saying that we should read $78,078.00 instead of $84,7—

Mr. Libenson: Instead of 83266, I took the 5188 off of that so that it would be as of today or the end of the month rather than including November and December.

The future lost earnings are 11 years at $33,722.00 equals $370,490.00 rather than the figures that I had in my other calculations because we have put in evidence that the work expectancy is 11 years. If the Court—

The Court: I see. You're multiplying 33,722 times 11 instead of 9½, is that correct?

Mr. Libenson: That's correct, Your Honor, and I would also like to point out to the Court that these calculations are without regard to the two known increases of 25 cents and 20 cents an hour which are $936.00 a year after 1972 so for the last nine years they would be nine times that and I'll

give you that figure. That's $8,424.00 and I would also request that I either have an opportunity to submit the cost of living which would also be included in the future lost earnings at 60 cents per hour.

The Court: We'll grant you leave to do that in your proposed findings of fact.

Mr. Libenson: Plus pain, suffering and inconvenience and the total lost earnings would be $456,992.00. That's past present and future and without the cost of living.

[444] The Court: Okay. Do you have anything further?

Mr. Libenson: Nothing further.

Mr. Murdoch: I have nothing further, Your Honor.

The Court: All right. Then if you will stay in touch with Mr. Witas, Rich Witas for scheduling the doctor—

Mr. Murdoch: All right. I hope to know tomorrow, Your Honor.

The Court: Okay. Thank you very much.

(Court was thereupon recessed at 4:50 p.m.)

[445] *REPORTER'S CERTIFICATION*

I hereby certify that the foregoing is a true and correct transcript of the proceedings held in the aforementioned action commencing Tuesday, October 28, 1980 and terminating Thursday, October 30, 1980 before the Honorable Maurice B. Cohill, Jr., District Judge.

FLORENCE JONES
Official Reporter, U.S. District Court
1023B Post Office
Pittsburgh, Pa. 15219
October 6, 1981

Office - Supreme Court, U.S.
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AUG 9 1982
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CLERK

No. 82-131

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION, owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,

Petitioner,

vs.

HOWARD E. PFEIFER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUT

RESPONDENT'S BRIEF IN OPPOSITION

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THE QUESTIONS PRESENTED FOR REVIEW

Whether this Court should review an opinion of the United States Court of Appeals for the Third Circuit which:

(1) holds that Respondent, Howard E. Pfeifer ("Pfeifer") had a valid cause of action against his employer-vessel owner pro hac vice, under Section 905(b) of the Longshoremen's and Harbor Worker's Compensation Act ("LHWCA") in accordance with well-established and controlling federal case law;

(2) approves an award of damages under the LHWCA fashioned by appropriate legal concepts relative to the calculation of damages; and

(3) concludes that the District Court properly mitigated Pfeifer's damages on the basis of the minimum wage rate, where the record clearly supports factual findings that J&L never offered Pfeifer any type of work nor discussed the availability of a light duty position with Pfeifer after his injury.

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No. 82-131

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION, owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,

Petitioner,

vs.

HOWARD E. PFEIFER,

Respondent.

BRIEF BY RESPONDENT HOWARD E. PFEIFER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Howard E. Pfeifer, opposes the petition for writ of certiorari for the reasons presented herein.

COUNTERSTATEMENT OF THE CASE

Respondent, Howard E. Pfeifer, brought this action pursuant to §905(b) of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 et seq. ("LHWCA"), to recover damages from Petitioner, Jones & Laughlin Steel Corporation ("J&L"), for personal injuries sustained as the result of J&L's negligence.

Pfeifer was employed by J&L as a landing helper on its coal barges. On January 13, 1978, he slipped and fell because of ice and snow that had accumulated on the gunnel of a barge on which he was working. He struck a barge rail and landed on his tailbone, and a heavy electric motor that he was carrying fell in his lap. He has not returned to work since the accident. He has been examined by a number of physicians, several of whom testified at the trial, and he has undergone extensive physical therapy.

In this non-jury action, the District Court found that J&L was negligent and that its negligence was the proximate cause of Pfeifer's accident and resulting injury. It determined further that Pfeifer was completely disabled from the date of the acci-

dent until July 1, 1979, and that thereafter he was capable of doing "light work" and lifing weights of up to twenty-five pounds, but that he could not work on the river. J&L has not offered Pfeifer a job of any type since his injury, and the parties have not discussed the availability of a light duty position.

The District Court determined that, as a vessel owner pro hac vice, J&L was liable for negligence under §905(b) of the LHWCA. In measuring damages, the District Court declined to consider future wage increases or to discount the award to present value, citing Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980). The District Court multiplied Pfeifer's 1978 annual wage by his work life expectancy, deducted the amount of compensation Pfeifer had received under the LHWCA, and subtracted his projected earnings at minimum wage from July 1, 1979, until his sixty-fifth birthday.

J&L does not challenge the District Court's findings that J&L was negligent and that its negligence was the proximate cause of Pfeifer's injury, nor does it contend that it was not correctly found to be an owner pro hac vice.

REASONS FOR DENYING THE WRIT

Rule 17 of the Rules of the Supreme Court of the United States provides that: "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." In the case sub judice, the Third Circuit's decision, which affirmed that of the District Court, is clearly correct and in accordance with applicable decisions of this Court and of federal appellate courts. Consequently, there are no special or important reasons for this Court to review the issues decided by the courts below, and the grounds asserted by J&L for the exercise of this Court's discretion are wholly without foundation or merit. A review of the arguments raised by J&L, and a presentation of the reasons for the denial of the writ, are presented separately for each issue below.

I. The decision of the Third Circuit affording Pfeifer a cause of action in negligence against his employer-vessel owner pro hac vice under Section 905(b)

of the 1972 Amendments to the LHWCA falls squarely within the holdings of each federal court of appeals which has addressed the issue, and there is no conflict in the circuits warranting review by this Court.

It has been clearly established by the federal courts of appeal that an injured employee may assert a cause of action in negligence against a vessel owner which is also the injured party's employer under Section 905(b) of the LHWCA. Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976); on appeal after remand, 610 F.2d 116 (3d Cir. 1979), vacated, 451 U.S. 965 (1981), reinstated on remand, 657 F.2d 25 (3d Cir. 1981) petition for cert. filed, 50 U.S.L.W. 3377 (U.S. Oct. 29, 1981) (No. 81-826), cert. denied April 5, 1982; Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976); Smith v. M/V Captain Fred, 546 F.2d 119 (5th Cir. 1977). J&L incorrectly asserts that there is a sharp division among the federal courts of appeal on this issue; to the contrary, a review of the decisions cited by J&L demonstrates the absence of any conflict in the circuits.

Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 545 F.2d 235 (1st Cir. 1976) and Arvidson v. Dillingham Corp., 462 F.2d 1 (9th Cir. 1972), cert. denied, 409 U.S. 983 (1972), cited by J&L, both involved interpretations of the LHWCA prior to the 1972 Amendments to the Act, and in no respect control the issue of J&L's liability under Section 905(b) of the 1972 Act. Furthermore, the interpretation of the pre-1972 LHWCA in Murphy is entirely dictum, because the First Circuit was without a sufficient record to determine whether the injured employee was covered by the LHWCA or whether the applicable state workman's compensation statute controlled. 545 F.2d at 237, 240-241. Murphy and Arvidson are further distinguishable in that the employees in question had been compensated under the state workman's compensation law, rather than the LHWCA, as in the case sub judice.

The remaining cases cited by J&L in its Petition at 7, do not reflect the decisions of any federal court of appeals, and therefore present no conflict with the well-established decisions of the Second, Third and Fifth Circuits. Furthermore, in Ed-

monds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), this Court interpreted Section 905(b) as affording a longshoreman a cause of action in negligence in a situation "where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company." 443 U.S. at 264. This Court cited with approval Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731 (1967) and Reed v. The Yaka, 373 U.S. 410 (1963), noting that, in both cases, it had upheld a longshoreman's negligence or unseaworthiness action against the shipowner-stevedore. 443 U.S. at 264 n.13. This Court further emphasized throughout its opinion that Congress clearly intended to treat all longshoremen similarly, whether employed by an independent stevedore or a shipowner-stevedore:

> The second sentence [of Section 905(b)] means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself. Id. at 266.

This Court also stressed the importance of liberally construing the 1972 Amendments to the benefit of the longshoremen the Act seeks to protect. Id. at 266, 270.

It should be noted that the Third Circuit stated that the identical arguments raised by J&L concerning the 1972 LHWCA Amendments were carefully considered in Griffith, supra, and were rejected by the Court. (Appendix A, 3a-4a).

Based on the above discussion, the Third Circuit's interpretation of Section 905(b), affording Pfeifer a cause of action in negligence against J&L, properly represents the holding which has been rendered by all circuits which have addressed the issue, is fully supported by this Court's decision in Edmonds, and has not been challenged by any controlling decision of the federal courts of appeal. Further review of this issue by this Court would not be warranted.

II. The Third Circuit properly applied federal law in calculating Pfeifer's damages.

J&L argues that the court below improperly applied Pennsylvania's law of damages in calculating Pfeifer's lost future earnings, and specifically, the decision of the Penn-

sylvania Supreme Court in Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980), in an action based on federal question jurisdiction.

This argument may be disposed of summarily on several grounds. First, the Third Circuit's opinion clearly indicates that the District Court did not consider itself to be bound by Kaczkowski in calculating Pfeifer's lost future earnings, but that the Court applied federal law in calculating damages. (App. A, 5a). Secondly, the Third Circuit itself held that J&L failed to preserve for review the contention that the lower court erred in applying Pennsylvania law, by not specifying any alleged error during the trial court proceedings and by failing to suggest or offer into evidence a legally appropriate course of action (App. A, 4a-6a). Based on these factors alone, J&L has waived any argument concerning the method of calculating damages.

In addition to the above grounds for declining review, it is well established that a federal court may properly borrow substantive state law and adopt it as federal law in calculating an award of damages. (App.

A, 7a-8a). See generally D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 472 (1942) (Jackson, J., concurring). This is particularly appropriate in the instant action where, unlike the antitrust treble damage statute, the LHWCA statute is silent as to the measure of damages to be applied. As a result, the lower court was clearly authorized as a matter of law to look to state law in fashioning a federal measure of damages, and the Third Circuit's decision was fully in accord with applicable federal precedent as established in this Court. See Imbler v. Pachtman, 424 U.S. 409 (1976); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Monroe v. Pape, 365 U.S. 167 (1961); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

Further support for this position is found in the opinion of this Court in Romero v. International Terminal Operating Co., 358 U.S. 354, 373-374 (1959), wherein Justice Frankfurter stated:

> to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce...Maritime law is not a monistic system. The State and Federal

> Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Additionally, and contrary to the allegations of J&L, there exists no great confusion or conflict among the circuits as to the issue of future inflation and the extent to which the effects of inflation should be taken into account in calculating damage awards. To the contrary, the vast majority of jurisdictions have held that future inflation is properly to be taken into account in calculating loss of future earnings. Doca v. Marina Mercante Nicaraguense, S. A., 634 F.2d 30 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981); Steckler v. United States, 549 F.2d 1372 (10th Cir. 1977); United States v. English, 521 F.2d 63 (9th Cir. 1975); Riha v. Jasper Blackburn Corp., 516 F.2d 840 (8th Cir. 1975); Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974) (decided under FELA as a matter of federal damages law); O'Shea v. Riverway Towing Co., No. 81-1924, slip op. (7th Cir. April 27, 1982); Pfeifer v. Jones & Laughlin Steel Corp., No. 81-1928, slip op. (3d Cir. April 16, 1982). Furthermore, the cases cited by J&L in an effort to demon-

strate a conflict are either inapposite or not controlling with respect to the issue of consideration of inflation in calculating damages, Byrd v. Reederei, 638 F.2d 1300, reh. granted, 650 F.2d 1324 (5th Cir. 1981) (criticized within the Fifth Circuit and rehearing granted on the issue of inflation); Williams v. United States, 435 F.2d 804 (1st Cir. 1970) (involving calculation of future loss of earnings under Rhode Island law in wrongful death action).

Moreover, in Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490 (1980), this Court recognized the reasonableness and propriety of estimating and accounting for the effects of inflation in fixing an award for future lost wages. Id. at 492, 494. See Doca, 634 F.2d at 36.

Absent any countervailing federal authority, allegations of error in the method of calculation applied below, or positive contention as to the proper method to have been applied in calculating damages, it is difficult to comprehend any basis for J&L's request for review. Nor has J&L demonstrated the manner in which the Third Circuit's decision creates confusion or controversy in calculating damages awards.

To the contrary, the Third Circuit's holding and analysis not only comports with the prevailing trend of the law of damages, but applies a method of calculation which is characterized by its efficiency of application and consistency of result. (App. A, 13a-16a).

Furthermore, were an inquiry to be made into the issue of the method to be employed in the calculation of damages, the instant case would be an inappropriate for such an inquiry. Pfeiffer was fifty-three (53) years of age at the time of his injury. As a result, calculation of his future loss of earnings is based on the relatively brief period of only twelve and one-half years. Any change in the method utilized would result in only minimal changes in the effective amount of Pfeifer's recovery, because of the short period of time involved prior to Pfeifer's presumed retirement.

Therefore, since the Third Circuit's decision comports with existing federal law, is based on sound legal principles, and is directed toward the advancement of consistency, certainty and judicial economy in fashioning awards, there are no special or significant reasons warranting the granting

of the requested petition for a writ of certiorari.

III. The District Court's use of the minimum wage as a factor in reducing Pfeifer's damage award, rather than the wage figure submitted by J&L, represents a finding of fact fully supported by the record and is not a proper subject of review by this Court.

In calculating Pfeifer's projected earnings, the District Court reduced his award by the amount of his projected earnings at the minimum wage until his presumed retirement at age sixty-five. This decision was fully supported by the facts adduced at trial. Specifically, these facts established that, as a result of his injuries, Pfeifer had been disabled from his regular employment, could no longer work on the river, and that J&L never offered Pfeifer a job of any type thereafter. Nor did J&L ever conduct any discussions with Pfeifer regarding the availability of a light duty job. (App. B, 36a).

Based on this factual predicate, J&L's argument that the award should have been reduced by the wages J&L pays its light duty

employees, when no light duty job was either offered or made available to Pfeifer, is wholly without merit. See Perini Corp. v. Heyde, 306 F. Supp. 1321, 1325-26 (D.R.I. 1969) (burden is on employer to establish that disabled employee has actual opportunities to obtain other work). Furthermore, J&L's argument that Pfeifer failed to pursue other employment is directly contradicted by the record.

Factual findings such as those rendered by the District Court below were properly reviewed by the Third Circuit under the "clearly erroneous" standard. Fed.R.Civ.P. 52(a). In this case, as the Third Circuit recognized, the Findings below were not clearly erroneous and were fully supported by the record. (App. A at 16a). As a result, the issue raised by J&L raises no novel or significant issue for consideration by this Court, and J&L's request for the granting of a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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I hereby certify that three (3) true and correct copies of the within Brief by Respondent Howard E. Pfeifer in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, were sent to:

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MOTION FILED
AUG 17 1982

No. 82-131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION
owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,
Petitioner

v.

HOWARD E. PFEIFER,
Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Keystone Shipping Company, Puerto Rico Marine Management, Inc., Sea-Land Service, Inc. and Sun Transport, Inc. hereby respectfully move for leave to file the attached brief amici curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of amici curiae in this case arises from their ownership and operation of numerous vessels engaged in interstate commerce and their exposure to personal injury actions subject to the rule of damages announced in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982). The interests of amici curiae may not be represented properly before this Court due to the limited involvement of the petitioner and respondent in interstate commerce. By reason of their familiarity with the maritime law of the several federal jurisdictions through which the vessels of Keystone Shipping Company, Puerto Rico Marine Management, Inc., Sea-Land Service, Inc. and Sun Transport, Inc. pass in interstate commerce, amici curiae are qualified to present to this Court a thorough exposition of the far-reaching effects of the *Pfeifer* decision.

WHEREFORE, Keystone Shipping Company, Puerto Rico Marine Management, Inc., Sea-Land Service, Inc. and Sun Transport, Inc. respectfully request leave of this Court to file the attached brief amicus curiae.

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INTEREST OF THE AMICI CURIAE

Amici Curiae, Keystone Shipping Company, Puerto Rico Marine Management, Inc., Sea-Land Service, Inc. and Sun Transport, Inc. are United States flag shipowners and operators whose vessels represent a substantial portion of the United States merchant fleet. Amici Curiae represent the interests of vessel owners and operators who, because of their extensive involvement in interstate and foreign commerce, are directly affected by the decision of the United States Third Circuit Court of Appeals in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982), as well as by decisions of other United States Courts of Appeal which are inconsistent with *Pfeifer*. Because of their relatively limited connection with maritime commerce, neither Petitioner nor Respondent can adequately protect the interests of the Amici. Therefore, Amici respectfully request leave to appear in this Court as amici curiae.

SUMMARY OF ARGUMENT

The decision in *Pfeifer, supra,* a longshoreman's personal injury action, to adopt the total offset method of accounting for the effect of inflationary pressures on future earning capacity by rejecting the time honored process of discounting awards to present value and adopting a rule which "offsets" inflation is inconsistent with express holdings of this Supreme Court as well as with those of other Courts of Appeal. See *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490, *reh'g denied,* 445 U.S. 972 (1980); *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485 (1916). Moreover, *Pfeifer, supra,* undermines the principles of federalism and uniformity which have remained the cornerstones of federal maritime jurisprudence in that it adopts a state rule of decision contrary to established maritime law in a maritime personal injury action. Differing approaches to the problem of forecasting the effect of inflation on future wages in maritime personal injury and death cases has created a conflict among the United States Circuit Courts of Appeal and the Appellate Courts of the several states.

The *Pfeifer* decision regarding the effects of inflation on computation of awards for lost wages subjects vessel operators to different liabilities depending on which United States ports and states they serve. The requirement of uniformity in United States Maritime law demands that this Honorable Court grant the petition of Jones & Laughlin Steel Corp. for writs certiorari.

IN ALL CASES ARISING UNDER THE LONGSHOREMENS AND HARBOR WORKER'S COMPENSATION ACT, DAMAGES MUST BE DETERMINED PURSUANT TO A UNIFORM FEDERAL STANDARD WHICH REQUIRES THAT A LUMP SUM AWARD FOR LOST FUTURE EARNINGS BE REDUCED TO PRESENT VALUE UNDER THE RULE OF CHESAPEAKE & OHIO RAILWAY V. KELLY, 241 U.S. 485 (1916)

This Court has long recognized that the maritime law of the United States must be uniform throughout the nation since the framers of our Constitution aimed at uniformity and consistency "on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." THE LOTTAWANNA, 88 U.S. (21 Wall.) 558 (1874). Recently, this Court reaffirmed that the duties and obligations of vessel owners and operators should not differ when they navigate within the territorial jurisdictions of the several States. *Foremost Insurance Co. v. Pansy F. Richardson*, ____ U.S. ____, 102 S.Ct. 2654 (1982). It is only when all vessel operators, no matter which ports of this country they serve, are subject to the same duties and liabilities, that the smooth flow of maritime commerce is served. *Id.* Since the United States Courts of Appeal have split in their treatment of the effects of changes in general price levels vis-a-vis computations of awards for future wage loss in maritime personal injury and death cases, this Court should grant certiorari to resolve the conflict among the varying approaches.

Particularly in the area of liabilities for maritime personal injury and death claims, this Court has stressed the need for a uniform body of federal law. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); M/V TUNGUS *v. Skovgard*, 358 U.S. 588, 601-02, 608-611 (1959) (Brennan, J., dissenting); *Pope & Talbot, Inc. v.*

Hawn, 346 U.S. 406 (1953); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215-16 (1917). *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 596, 601 (1974) (Powell, J., dissenting), *reh'g denied*, 415 U.S. 986 (1974).

In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), the Court declined to give effect to a Congressional enactment "saving . . . to claimants the rights and remedies under the workmens' compensation law of any State." *Id.* at 156. The Court rejected a compensation scheme that subjected maritime employers to inconsistent liabilities depending on where they happened to do business. The rationale underlying the *Knickerbocker* decision applies with equal force to the case at bar.

The Third Circuit Court of Appeals decision in the case of *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982) has deepened the conflicts among the U.S. Circuit Courts of Appeal concerning calculation of awards for future wage loss and will subject vessel operators to inconsistent liabilities depending on where in the United States they happen to trade, or if they are amenable to service of process in several judicial districts.

The method of calculating damages in maritime personal injury cases is controlled by the uniform rule established by this Court in *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485 (1916), a wrongful death action under the Federal Employer's Liability Act, 45 U.S.C. §51 *et seq.* (FELA). The Court ruled that damages in such an action "should be equivalent to compensation for the deprivation of pecuniary benefits that would have resulted from the continued life of the deceased." *Id.* at 489. With respect to an award for future wage loss, the Court held that it is an economic fact of life that a sum of money in hand is worth more than a like sum paid out over time, and, that in view of the fact that a party seeking to recover damages must act reasonably to limit the amount of damages he sustains, awards

for future losses should be discounted to reflect the interest that might reasonably be earned over time in safe investments by one with no particular knowledge or skill in financial matters. *Id.* at 489-90.

This Court in *Kelly* expressly refused to lay down a precise formula for application of a discount rate. *Id.* at 491. The Court suggested that expert testimony or evidence in the form of standard interest and annuity tables would provide a basis for determining the proper discount rate to be applied. *Id.*

In 1971, Chief Judge Friendly wrote that the requirement of discounting future losses to present value was in line with so many "familiar and controlling decisions" that extended citation in support of it became "supererogatory"; *Yodice v. Koninklijhe Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 77-78 (2d Cir. 1971), *cert. denied*, 411 U.S. 933 (1973). In the 1970's, as in years past, *Kelly, supra*, was routinely cited throughout the circuits as the general rule for cases arising under the FELA, the Jones Act, 46 U.S.C. §688, the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. §§901 *et seq.* ("LHWCA"), and even the Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.* ("FTCA"). *Chiarello v. Domenico Bus Service*, 542 F.2d 883, 886-87 (2nd Cir. 1976); *Yodice, supra*, at 79 (LHWCA); *Fuhrman v. Reading Co.*, 439 F.2d 10, 14-15 (3d Cir. 1971) (FELA); *Murphy v. National Railroad Passenger Corp.*, 547 F.2d 816, 818 (4th Cir. 1977) (FELA); *Ivy v. Security Barge Lines*, 585 F.2d 732 (5th Cir. 1978), *modified on different grounds*, 606 F.2d 524, 529 (5th Cir. 1979), *cert. denied*, 446 U.S. 956 (1980) (Jones Act); *Blue v. Western Ry. Co. of Alabama*, 469 F.2d 487, 496 (5th Cir. 1972) *cert. denied*, 410 U.S. 956 (1973) (FELA); *Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 904 (5th Cir. 1972) *cert. denied*, 423 U.S. 839 (1975) (Jones Act); *Petition of U.S. Steel*, 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), *reh'g denied*, 403 U.S. 924 (1971) (Jones Act);

Beanland v. Chicago, Rock Island and Pacific RR. Co., 480 F.2d. 109, 114-15 (8th Cir. 1973) (FELA); *United States v. English*, 521 F.2d 63, 72 (9th Cir. 1975) (FTCA).

In 1980, this Court reaffirmed the continuing vitality of the rule in *Kelly, supra*, i.e., that the measure of recovery in cases controlled by federal law is "the damages that flow from the deprivation of the pecuniary benefits" which the injured parties might reasonably have received. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980), *reh'g denied*, 445 U.S. 972 (1980). The specific holding under the facts in *Liepelt* was that under this federal standard, evidence of tax payable on a decedent's past and future earnings was relevant to the calculation of "pecuniary benefits which the beneficiaries might have reasonably received" and that consideration of tax liability in computing a net loss to plaintiff was not so speculative as to render competent evidence inadmissible. 444 U.S. at 494. The Court mentioned that considerations of future economic trends, like prediction of tax liabilities and even the future course of a plaintiff 's health, are matters involving prediction and estimation but that the bench and bar have developed effective methods of presenting the essential elements of expert calculations in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. *Id.* at 494.

With respect to consideration of the effects of inflation on an injured party's future earning capacity in computing a damage award under federal law, several of the Circuits have followed the approach of *Kelly, supra*, and *Liepelt, supra*, in considering competent evidence of the effect of inflation on a claimant's future earning capacity. *See, e.g. United States v. English*, 521 F.2d 63, 72 (9th Cir. 1975); *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980) *cert. denied*, 451 U.S. 971 (1981); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982). Other Circuits, while

recognizing that *Kelly, supra,* and its progeny require that future wage losses be discounted to present value, follow the traditional rule that evidence of future inflationary trends is too speculative to provide a reasonable factual basis for consideration of the potential effect of future inflation rates on earning capacity. *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir., Unit A, 1981); *Byrd v. Reederei*, 638 F.2d 1300 (5th Cir., Unit B, 1981), *rehearing en banc granted*, 650 F.2d 1324 (5th Cir., Unit B, 1981) (LHWCA — declining to include the effects of future inflation in assessing damages on the grounds that the foregoing language quoted from *Liepelt*, 444 U.S. at 494, was only dicta and that prior Fifth Circuit precedent controlled the decision [citing *Johnson v. Penrod Drilling Co., supra.*]).

In all of the foregoing cases, the doctrine requiring a reduction in future earnings to present value has consistently been followed. However, in the *Pfeifer* case, the Third Circuit Court of Appeals departed from this doctrine and "borrowed" the law of Pennsylvania as most recently pronounced by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980). The Court below clearly erred in adopting the law of the Commonwealth of Pennsylvania to supply the method of computation of damage awards for future lost wages in maritime personal injury cases in light of the established federal standard of computation embodied in *Norfolk & Western Railway Co. v. Liepelt, supra; Chesapeake & Ohio Railway Co. v. Kelly, supra. See Griffith v. Wheeling Pittsburgh Steel Corp.*, 610 F.2d 116, 129 (3d Cir. 1979), *vacated*, 451 U.S. 965 (1981); *J. Ray McDermott & Co. v. M/V MORNING STAR*, 431 F.2d 714 (5th Cir. 1970), *reh'g*, 457 F.2d 815 (5th Cir. 1972), *cert. denied sub nom., Fish Meal Co. v. J. Ray McDermott & Co.*, 409 U.S. 948 (1972).

Not only has *Pfeifer v. Jones & Laughlin Steel Corp., supra*, effectively removed from consideration the well-settled principle of discounting damages to present

value, but also the Third Circuit has done so by improperly adopting state law to govern an important issue of federal law in contravention of an established federal rule. The *Pfeifer* decision is an ill-advised attempt to facilitate calculation of damages in federal courts while undermining important uniform principles of federal law clearly stated in the *Kelly* and *Liepelt* decisions.

While the *Pfeifer* court "bid fealty" to the concept of reducing future earnings to present worth, 678 F.2d at 461, the "total offset method" adopted by the court under the Pennsylvania case of *Kaczkowski v. Bolubasz*, *supra*, cannot be meaningfully reconciled with *Kelly's* emphasis upon the earning power of money presently received. This analysis is supported by the Seventh Circuit's decision in *O'Shea v. Riverway Towing Company*, 677 F.2d 1194 (7th Cir. 1982), decided 11 days after *Pfeifer*. In that case, Judge Posner took judicial notice of the so-called "Fisher effect," which predicts that, while the "real" rate of interest remains constant, the nominal rate rises proportionally in response to the pressures of inflation. *See* I. Fisher, *The Theory of Interest*, 43 (1930); R. Posner, *Economic Analysis of Law*, 78-79 (1973). In light of this analysis, Judge Posner concluded that to utilize the current interest rate as a discount rate would serve, in effect, to deduct an inflation penalty from a claimant's recovery, since that rate would compromise a certain allowance for current inflation, 677 F.2d at 1200. The proper method of discounting would involve a reasonable approximation of the real rate of interest. *Id; Doca v. Marina Mercante Nicaraguense*, 634 F.2d 30 (2d Cir. 1980), *cert denied*, 451 U.S. 971 (1981). The significance of *Doca's* conclusion that competent evidence of inflation may be considered is its reaffirmation of the holding of *Kelly*, *supra*, decided before inflation became a major economic consideration. *See* J. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D. L. Rev. 307, 309 (1975).

Pfeifer, supra, is an ill-advised attempt to facilitate calculation of prices and interest rates over time by excluding any evidence and adopting a rule of law (the total offset method) that has no basis in actual economic conditions which may change. *Pfeifer's* approach is destructive of the uniformity of maritime law.

A comparison of the decisions of the several States concerning these economic factors reveals a wide difference of opinion between the *Pfeifer* reasoning on the one hand and that of the other federal district and Circuit courts and other State appellate courts on the other hand. If the federal courts continue to apply the state laws, the results will necessarily be disparate. *Compare Beaulieu v. Elliot,* 434 P.2d 665 (Alaska, 1967); *Kaczkowski, supra; Freeman v. Lanning Corp.,* 233 N.W.2d 68 (Mich.Ct.App. 1975).

Beaulieu v. Elliot, 434 P.2d 665 (Alaska 1967), established the rule under Alaska law that prospective damages would not be subject to a discount factor for calculation of present worth. That Court assumed that future inflation would erode the purchasing power of money in direct proportion to the interest which can be earned on the principal amount. While the Pennsylvania Supreme Court chose in *Kaczkowski, supra,* to adopt the total offset method, other jurisdictions have experienced considerable difficulty in dealing with the role of inflation in damage awards and have reached divergent results. *See generally Kaczkowski, supra,* and cases cited therein.

In *Freeman v. Lanning Corporation,* 233 N.W.2d 68 (Mich. Ct.App. 1975), the Michigan Court of Appeals, noting that a large number of jurisdictions had refused to allow consideration of rising costs in fixing prospective damages, applied a statutory discount rate of six percent. However, the same Court of Appeals four years later held that no reversible error occurred when inflationary factors were considered by an expert computing future loss of wages.

The Iowa Supreme Court in *Schnebly v. Baker*, 217 N.W.2d 708 (Iowa 1974), ruled that evidence of future inflation is admissible in assessing future losses. In that case, plaintiff's expert testified without reservation that the inflation rate equaled the discount rate. However, the Minnesota Supreme Court in *Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672 (Minn. 1977), held that while effects of inflation are properly considered in the context of future losses, expert testimony established a net discount rate of one percent and the trial court did not err in permitting the jury to consider the testimony.

In applying Alabama law, the middle district court acknowledged that inflation is a probable component in future damages but only in those cases where an appropriate adjustment has been made for the effect of income tax. (The district court then proceeded to discount future damages by a factor of six percent). *Overstreet v. U.S.*, 528 G. Supp. 838 (M.D. Ala. 1981).

In light of these conflicting results, it should not be surprising that the very court which set forth the total offset method in *Beaulieu v. Elliot, supra,* later questioned the validity of their conclusion that inflation is an automatic offset to the interest which would be earned through investments. *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916 (Alaska 1977).

The significance of the foregoing conflicting results is apparent. If *Pfeifer, supra,* is permitted to stand, the federal courts remain free to adopt from the states different methods of calculating damages in cases arising under the LHWCA. This does violence to traditional notions of uniformity in federal maritime law.

Computation of damages in an action under Section 33 of the LHWCA is peculiarly federal in character. No significant local concern exists as a required rationale for a federal court's adoption in the context of an LHWCA case of the law of the forum state or the law of the place of the injury. The federal rule of decision

should be applied. *Compare Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851). Unlike the situation presented to the Court in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), the locus of the injury in a typical LHWCA case is not analogous to an oil rig permanently moored off the coast of a particular state to the oil field there. Rather the locus of an injury in an LHWCA case is a vessel in the traditional maritime context which moves from port to port throughout the United States.

Resolution of this case can be accomplished according to federal maritime law as previously developed by this Court and does not require development of a new body of federal law. *Compare Wilburn Boat Co. v. Fireman's Insurance Co.*, 348 U.S. 310, 319 (1955). But *See* the concurring opinion of Frankfurter, J., in *Wilburn Boat Co., id.* at 322-4.

The Third Circuit concluded in *Mascuilli v. United States*, 411 F.2d 287 (3d Cir. 1969), that an action under the LHWCA was governed by the maritime law, that Pennsylvania law was not controlling, and that the flat discount rate of 6% then mandated by Pennsylvania law should properly give way to the more flexible federal standard enunciated in *Kelly, supra. O'Shea, supra*, remains faithful to this flexible standard, but the *Pfeifer* decision seeks to replace that standard with precisely the same sort of rigid state standard rejected in *Mascuilli, supra*. In so doing, the *Pfeifer* court has abandoned *Kelly* and *Liepelt, supra*, as well as the flexible approach to the problem of lost future earnings which permitted the finder of fact to hear evidence to determine the proper measure of damages. Because the *Pfeifer* approach is not authorized by *Kelly, supra*, or its progeny, and because it further erodes the uniformity so important in maritime law, Amici submit that resolution by this Court of this inconsistency is urgently required.

To the extent that this Court's decision in *Norfolk and Western Railroad Company v. Liepelt, supra*, discusses the application of an inflation factor in calculating damages for future wage losses in maritime personal injury and death cases, Amici submit that the foregoing case provides a method for applying the inflation factor consistent with federal maritime law. The Fifth Circuit Court of Appeals in the cases of *Culver v. Slater Boat Company*, 644 F.2d 460 (5th Cir., Unit A, 1981) and *Byrd v. Reedreri*, 638 F.2d 1300 (5th Cir., Unit B, 1981) have held that *Liepelt* does not require that inflation be considered as a factor in assessing damages for future wage losses in maritime cases.

In *Liepelt*, this Court suggested that inflation could be one factor among others to be considered by a jury upon presentation of proper proof in a determination of future wage losses. *Id.*, p. 494. This Court further stated that "Any one of these issues might provide the basis for protacted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life." *Id.*, p. 494.

Upon the foregoing, Amici submit that this Court has stated a federal rule that if inflation is a factor to be considered in determining the quantum of future losses, it must be proven by competent evidence.

In the *Pfeifer* decision, however, the Third Circuit Court of Appeals has fashioned a rule which requires no proof of the effect of future inflation but instead presumes that the discount factor is and will be totally offset by inflationary conditions. Amici submit that the foregoing legal presumption adopted by the Third Circuit directly conflicts with this Court's stated preference for proof of all damages, including an inflation factor, by competent evidence. *See also, Michigan Central Railway Company v. Vreeland*, 227 U.S. 59 (1913).

Furthermore, Amici submit that the Third Circuit's substitution of the Pennsylvania State Rule of Damages relating to the computation of future wage losses directly violates this Court's federal rule on this very point as set forth in the *Liepelt* case.

Amici submit that these further inconsistencies between the *Pfeifer* decision and the *Liepelt* decision urgently require resolution by this Court.

CONCLUSION

For the reasons stated in Petitioner's brief and in the arguments advanced by these Amici, we respectfully request that this Court grant the Petition for Certiorari filed by Jones & Laughlin Steel Corporation.

Respectfully submitted,

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No. 82-131

IN THE

Supreme Court of the United States

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION,
Petitioner,

vs.

HOWARD E. PFEIFER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER

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Questions Presented

1. Whether a longshoreman, who is receiving benefits under the Longshoremen and Harbor Worker's Compensation Act, is entitled to maintain an action against his employer for negligence under §905(b) of the LHWCA, when the employer is the owner or owner *pro hac vice* of the vessel upon which the longshoreman suffered his injuries.

2. Whether federal courts may apply a state's law of damages, or, alternatively, borrow the underlying theory of state law, in calculating the proper measure of damages for future loss of earning, under a federal maritime statute, and, if inflation is a proper consideration, whether the federal courts should disregard expert testimony concerning inflation and adopt a rule of law whereby it is assumed that the rate of inflation will always equal the rate of interest in the future and refuse to discount lost earnings to present value.

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IN THE

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No. 82-131

JONES & LAUGHLIN STEEL CORPORATION,
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vs.

HOWARD E. PFEIFER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 678 F.2d 453 (3rd Cir. 1982) and is reproduced as Appendix A to the Petition for Writ of Certiorari included herein. The opinion of the United States District Court for the Western District of Pennsylvania has not yet been reported and is reproduced as Appendix B to the Petition for Writ of Certiorari included herein.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The judgment of the Court of Appeals (App. A, *infra*, 17a) was entered on April 16, 1982. A *sur* petition for rehearing *en banc* was denied on May 20, 1982, with Judge Adams joined by Judge Hunter dissenting (App. A, *infra*, 21a). The certified judgment in lieu of formal mandate was issued on May 28, 1982 (App. A, *infra*, 23a). Appellant's motion for stay of mandate filed on June 2, 1982 was treated as a motion to recall the mandate. The motion was granted and the mandate recalled by Judge Aldisert on June 8, 1982 (App. A, *infra*, 25a). The petition herein was filed on July 14, 1982 and granted on October 4, 1982.

Statutory Provisions Involved

The relevant statutory provisions are §905, subsections (a) and (b), and §933 of the Longshoremen's and Harbor Worker's Compensation Act. These statutory provisions are reproduced in the petition for writ of certiorari at pp. 2-4.

Statement of the Case

Howard E. Pfeifer, respondent, instituted this third party negligence action in District Court alleging jurisdiction on the basis of Section 905(b) of the Longshoremen's Harbor Worker's Compensation Act (LHWCA).

Respondent was employed by Jones & Laughlin (J&L) as a landing helper, working on J&L's coal barges. On January 13, 1978, respondent suffered injuries when he fell on the gunnel of the barge while carrying a motor and breaker box for use in pumping out barges.

Respondent never returned to work after the incident and, at the time of trial, was on a disability pension from J&L for physical impairments which had nothing to do with the incident of January 13, 1978. Pfeifer made a claim for and received payments within the terms of the LHWCA. He then filed the instant negligence action against J&L as the employer vessel owner *pro hac vice* of the barge.

The District Court determined that petitioner, as a vessel owner *pro hac vice*, was liable for negligence under §905(b) of the LHWCA, rejecting petitioner's argument that §905(a) precludes an employers third-party liability where the employer has secured payment of compensation in compliance with §904 of the LHWCA, 33 U.S.C.A. §904. The District Court also held that the recent Pennsylvania Supreme Court case of *Kaczkowski vs. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), dictated that the damages for lost future earnings not be discounted to present value. Finally, the District Court held that damages for future earnings should be factored on the basis of the minimum wage rate instead of wages for light duty work. In reaching this conclusion, the Court rejected petitioner's argument that there is no logical reason why J&L should have been required to offer a light duty position to respondent when the facts adduced at trial showed that respondent was totally disabled and the disability was unrelated to the incident of January 13, 1978.

The Third Circuit Court of Appeals affirmed all three questions on appeal. The appeals court rejected petitioner's §905(b) LHWCA argument on the basis of the holdings in *Griffith vs. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), and *Reed vs. The Yaka*, 373 U.S. 410 (1963).

Likewise, the appeals court rejected petitioner's argument that lost future wages be discounted to present value. And although the Court stated that the holding in the Lower Court was limited to the proper federal measure of damages, it stated later in the opinion that it could find no jurisprudential impediment to the adoption of Pennsylvania's measure of damages. Finally, the Court concluded that the District Court's set-off based on the minimum wage rate was not "clearly erroneous" under the standard of Fed.R.Civ.P. 52(a).

The Court of Appeals denied petitioner's *sur* petition for rehearing on May 20, 1982, and a certified judgment in lieu of mandate was issued on May 28, 1982. Petitioner's motion for stay of mandate was treated as a motion to recall the mandate. Judge Aldisert granted the motion and recalled the mandate in order to allow petitioner the opportunity to petition this Court for writ of certiorari. The certiorari was granted on October 4, 1982, but only to the first two questions: whether the action by an employee against his employer as the owner of a barge was proper under §905(b) of the LHWCA and whether or not the lower courts were correct in applying Pennsylvania law to a federal case of action regarding the proper measure of damages.

Summary of Argument

Petitioner respectfully submits that the lower courts were wrong in allowing the respondent herein to maintain an action in negligence against his employer under §905(b) of LHWCA. In so doing the clear and specific meaning of §905(a) of LHWCA has been ignored. That section states that the longshoreman's exclusive remedy against his employer is limited to compensation payments under the LHWCA. In the instant matter the respondent did in fact receive compensation and is still receiving compensation. This action in negligence under §905(b) was allowed on the basis that the vessel can be sued for negligence. It is the position of the petitioner that the vessel may be sued in negligence but only in a situation where the employer of the injured seaman is not the owner or owner *pro hac vice* of that vessel. To hold otherwise allows a standard of double recovery for the injured longshoreman, one under the compensation benefits and another in a direct negligence action against the employer. It is obvious that, by enacting the 1972 amendments, Congress was attempting to place an injured longshoreman in the same position as land-based employees regarding the ability to file a negligence action against their employers. It is equally obvious that the workmen's compensation laws of the various states have been enacted to ensure that injured employees are compensated while at the same time taking away any right which the injured employee would have to file a direct action against his employer. Based upon the intent of Congress there is no rational reason why the LHWCA should be interpreted any differently, and on that basis Petitioner respectfully submits that the action filed by the respondent in the lower court should have been dismissed.

The second argument raised by the Petitioner is presented in the alternative. The first point is based upon a literal reading of the findings of fact from the lower court in that the recently enacted Pennsylvania law regarding the measure of damages was applied by the district court to this action which was brought pursuant to a federal maritime statute. Pennsylvania law provides that awards for lost future earnings shall not be discounted to present value on the assumption that the discount rate in the future would be equai to the rate of inflation. Petitioner submits that the district court erred in taking this approach, particularly in light of the many cases which set forth that there should be a uniform maritime law under which commerce between the states and with other nations would proceed without interference. By applying the Pennsylvania measure of damages, commonly called the "total off-set" theory, the lower court has completely ignored the mandate of uniformity in maritime law and, if the district court's decision is endorsed, the court has opened the door for forum shopping by injured plaintiffs based upon the various state laws in different jurisdictions.

The Third Circuit Court of Appeals, in affirming the district court's decision, took the position that the district court did not apply Pennsylvania law but merely borrowed the ingredients and applied it to the *Pfeifer* case. In reading this conclusion, it was necessary for the circuit court to completely ignore the findings of the lower court (Joint App. at 74, 75). It is submitted that the court of appeals' conclusion is clearly erroneous. However, even if this Honorable Court agrees with the court of appeals that Pennsylvania law was not applied *per se*, the holding of the circuit court has created an even greater

problem. In using the "total offset" theory, the circuit court has effectively stated that the time honored procedure of reducing loss of earnings to present value has been overturned. *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485 (1916) represents the federal law respecting the proper measure of calculating damages and based upon that case, the award here should have been discounted to present value.

Both lower courts took it upon themselves to decide, without the aid of expert testimony, that the future inflation rates will always equal future interest rates. If the courts are going to consider (or discuss) inflation in calculating awards for lost future income, Petitioner respectfully submits that the evidentiary rule adopted by the Eighth Circuit in *Taenzler vs. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) should be adopted as the proper federal rule. The *Taenzler* approach avoids speculative inquiries into inflation by allowing the parties to introduce, and the fact-finder to evaluate, relevant expert testimony regarding future merrit and productivity and wage increases of workers engaged in the claimant's specific occupation, in claimant's specific geographic area. Under this approach, the trial court then instructs the fact-finder to reduce the award to present value using the discount rates submitted by the experts at trial. While inflation is a national problem, the *Taenzler* evidentiary approach operates on the irrefutable basis that inflation affects different occupations and areas of the nation differently. In this regard, *Taenzler* provides flexibility where flexibility is needed.

I. §905(a) of the Longshoremen's and Harbor Workers' Compensation Act should be restored to its original meaning and preclude §905(b) third party negligence actions against employer-vessel owners and employer-vessel owner *pro hac vice*.

Section 905(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) provides in part that "[t]*he liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee. . .*" 33 U.S.C.A. §905(a) (emphasis added). Notwithstanding the clear meaning of this language, four circuits have held or indicated *in dicta* that §905(b) affords an injured employee a cause of action in negligence against his employer when the employer is the vessel owner or owner *pro hac vice*. *Griffith vs. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Napoli vs. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (E.D. Va. 1976); *Smith vs. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977). Three circuits and the New York Court of Appeals have ruled or indicated *in dicta* that §905(a) imposes an absolute limitation and forecloses §905(b) third party negligence suits by an employee against an employer-owner or owner *pro hac vice*. *Arvidson vs. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972); *Murphy vs. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976); *Houston vs. Bechtel Associates Professional Corp.*, 522 F. Supp. 1094 (D.C.D.C. 1981); *O'Rourke vs. Long*, 41 N.Y. 2d 219, 391 N.Y.S.2d 553, 359 N.E.2d 1347 (1976). These courts have taken the approach that §905(a) means exactly what it says, namely, that an

employers' liability for compensation shall be "exclusive and in place of all other liability."

Petitioner respectfully submits that the exclusive liability provision of §905(a) should be restored to its clear and specific meaning. First, the plain meaning of the statute recommends this approach. Second, the legislative history of the 1972 amendments shows that Congress intended to put teeth back into and not to expand the limitation of liability provision: Congress eliminated the unseaworthiness remedy as the *quid pro quo* for the increase in the amount in LHWCA compensation benefits, thereby restoring certainty and predictability to the compensation scheme. Third, since the original enactment of the LHWCA in 1927 and through the 1972 amendments, Congress has strived to insure that injured longshoremen are treated similarly to their land-based counterparts, who are limited to compensation claims against their employers, and there is no sound reason for treating them differently. Finally, the Petitioner submits that insofar as these §905(b) third party negligence suits have arisen out of the courts' concern that injured longshoremen are undercompensated, it is Congress' responsibility to evaluate and correct any deficiencies that may exist; the courts should not be permitted to fashion remedies which thwart Congress' policy determination that employers who provide compensation under the LHWCA shall not be subject to further liability.

From its inception, the LHWCA provided that an employer's liability for compensation under the Act was to be "exclusive and in place of all other liability" to an injured longshoreman or harbor worker. 33 U.S.C. §905 (*as originally designated*). Molded after the New York

Compensation Act, the LHWCA reflects the classic trade-off inherent in such workmen's compensation systems: the worker forfeits his common law right to sue in tort and receives the right to statutory benefits without regard to the employee's contributory negligence or the employer's faultlessness. This guarantees compensation to the injured longshoreman and provides a predictable scheme whereby an employer can adequately insure against its own costs and keep social costs at a minimum.

Four pre-amendment decisions of this Court which have provided a great deal of post-amendment discussion are *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (Stone, Frankfurter, Burton, JJ. dissenting), *Reed v. The Yaka*, 373 U.S. 410 (1963) (Harlan and Stewart, JJ. dissenting) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967) (Stewart and Harlan, JJ. dissenting); *Ryan Stevedoring Co., Inc. vs. Pan-Atlantic S.S. Corp.*, 349 U.S. 926 (1955).

In *Sieracki*, this Court held that while Congress intended the remedy of compensation to be exclusive as against the employer, it did not intend this remedy to affect others against third persons, and, in particular, permitted the stevedore to pursue his unseaworthiness claim against the ship owner who was not the employer. This Court continued by stating:

> "The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, *Except possibly in the instance, presumably rare, where he may be hired by the owner,*" 328 U.S. at 102 (emphasis added).

Sieracki, therefore, made it possible for the longshoreman's employer to recover the amount of

LHWCA benefits he was obliged to pay to his employee from the shipowner where the shipowner's breach of seaworthiness caused the employee's injury.

In *Ryan*, this Court held that a shipowner who was forced to pay off a *Sieracki* claim brought by a longshoreman injured by the unsafe stowage of cargo could recover full indemnity from the longshoreman's employer, a stevedoring concern, if a breach of the latter's warranty of workmanlike performance contributed to the injury. *Ryan*, therefore, removed as a practical matter the protection afforded an employer under §905, since the stevedore became indirectly liable for its employee's injuries.

In *Yaka*, the injured longshoreman was employed directly by the vessel owner *pro hac vice*. Justice Black, speaking for the Court, announced that the owner *pro hac vice* should not be allowed to avoid the obligation of seaworthiness. The effect of the holding in *Yaka* was to emasculate the exclusivity provisions of the LHWCA in order to avoid, what the Court termed, "harsh and incongruous results" in light of its previous holdings in *Sieracki* and *Ryan*. 373 U.S. at 415. *Yaka* was later endorsed in *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967), where this Court, when faced with a nearly identical situation, once again held that the exclusivity provision of the LHWCA did not defeat an action against the employer-vessel owner for unseaworthiness.

When Congress amended the LHWCA in 1972, it was acutely aware of those decisions discussed above, and it greatly increased the benefits available under the Act. It redesigned §905 into two parts to be read together. Congress designated §905(a) as the exclusivity provision and added §905(b).

> "in the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person * * * may bring an action against such vessel as a third party in accordance with provision of section 933 of this title *and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.* If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time of the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."
> 33 U.S.C. §905(b). (emphasis supplied).

Section 905(b) replaces the longshoreman's unseaworthiness action with a negligence action and eliminates the vessel's right to seek indemnity from the injured plaintiff's employer. The effect of this section is, as Mr. Justice Marshall noted in *Cooper Stevedoring Company Inc. vs. Fritz Kopke, Inc.*, 417 U.S. 108, 113 n.6 (1974), that *Sieracki* and *Ryan* are annulled. Furthermore, the apparent purpose of the second and third sentences in §905(b) was to reverse *Yaka. G. Gilmore & C. Black, The Law of Admiralty*, 450 (2d ed. 1975).

The Ninth Circuit, while recognizing that *Yaka* permitted a longshoreman to sue the ship owner-employer directly, has held that this particular right of recovery is

limited to the unseaworthiness context. *Arvidson vs. Dillingham Corp.*, 462 F.2d 1, 4 (1972). As a Ninth Circuit District Court later suggested in *Baker vs. Pacific Far East Lines, Inc.*, 451 F. Supp. (N.D. Calif. 1978), the following language from *Cooper, supra*, indicates that this Court agrees:

> "[E]ven if Erie were negligent, its injured employee was entitled to claim compensation from it under the Harbor Workers' Act, and Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provision." *Cooper*, 417 U.S. at 115 (1974).

Petitioner submits that the clear and specific meaning of the language of §905(a) compels the conclusion that Congress intended that employers would not be subject to direct negligence suits by employees under §905(b). The only exception provided for by the Act is where the employer fails to secure compensation within the terms of §904. As the Third Circuit Court of Appeals conceded in *Griffith*, there is no exception for §905(b) liability where the party is both the employer and the vessel. *Griffith* and its progeny have allowed §905(b) actions by creating a legal fiction in that an employer-vessel owner is considered as two entities for the limited purpose of §905(b) actions against employers.

The legislative history of the 1972 amendments, evinces Congress' intent to restore the exclusivity provision to its *pre-Sieracki-Ryan* position. This Court has examined the amendments and in *Cooper, supra*, Mr. Justice Marshall wrote:

> ". . .[T]he 1972 amendments to the Harbor Workers' Act re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act

should be the employee's exclusive remedy." 417 U.S. at 112-113.

Furthermore, the Congressional Committee responsible for holding hearings and overseeing the drafting of the 1972 amendments stated that:

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'nondelegable duty,' or the like," *S. Rep. No.* 1125 at 10 (1972).

Later, the Committee commented:

> ". . . The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party then is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." *S. Rep. No.* 1125 at 11 (1972).

The legislative history is replete with expressions that rejuvination of the exclusivity provision and the elimination of the unseaworthiness action were the *quid pro quo* for the substantial increase in LHWCA benefits. *See, e.g., S. Rep. No. 1125, 92d Cong., 2d Sess. 4* (1972); *H.R. Rep. No. 1441, 92d Cong. 2d Sess. at* 4699, *reprinted in* [1972] *U.S. Code Cong. & Admin. News* pp. 4698-9, 4705; 118 *Cong. Rec.* 36381-3 (1972).

Closely related is the fact that the LHWCA was designed as a typical workers' compensation scheme and was modeled after New York's system. This has prompted at least two courts to remark that the LHWCA, like its state counterparts, reflects the classic trade-off between the certainty of benefits for the injured employee and the limitation of the employer's liability. *Murphy v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 545 F.2d at 238; *Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. at 95-6; *See also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, _____ (1977). Likewise, under state compensation systems, the employees, claim for compensation represents the full extent of the employer's liability for all injuries resulting from unintentional misconduct. *See*, 2A A. *Larson, The Law of Workmen's Compensation*, §68.13 at 13-5 (1952). Importantly, New York is in accord.

In that regard, the Petitioner submits that the right to bring an action against a vessel as a third party, exists only where the vessel owner to one other than the plaintiff's employer. To hold otherwise has two immediate effects. It first of all, completely negates §905(a) of the LHWCA which provides the exclusivity provision for longshoremen. This is particularly true where, as in the instant case, payments are still being made under the LHWCA. Secondly, there is a provision in §905(b) which states ". . . the employer shall not be liable to the vessel. . ." to allow such an action against the vessel, when the vessel is owned by the employer, nullifys the existence of the aforesaid provision. As a practical matter in the event of liability of the vessel, the employer is then called upon to pay on behalf of the vessel under

Griffith. Certainly Congress had to intend that an action against the vessel could only be sustained in a three-party situation. If the intent was different, the amendments allowed an increase in benefits for the longshoremen while deluding the exclusivity provision. The legislative history indicates that was not the intent. *O'Rourke v. Long*, 41 N.Y. 2d 219, 391 N.Y.S. 2d 553, 359 N.E.2d 1347 (1976). Given Congress' intent to provide injured longshoremen the same treatment as their land-based counter-parts, courts which have allowed §905(b) suits against employer-vessel owners and owners *pro hac vice* have violated the underlying principles of the LHWCA.

Finally, Petitioner asserts that insofar as these §905(b) negligence suits have arisen out of some courts' concern that injured longshoremen are undercompensated, it is Congress' duty to re-evaluate the compensation system provided by the LHWCA and to amend it if Congress deems it necessary. The benefits paid under the LHWCA are near the top if not at the top of all compensation programs. In the words of Mr. Justice Harlan in his dissent in *Yaka*, "there is an outer limit beyond which judicial construction of the language of a statute ought not to go." Petitioner respectfully submits that the limit has been exceeded here and implores this Honorable Court to restore the protective mantle of the §905(a) exclusive liability provision in cases where the owner or owner *pro hac vice* is also the injured longshoreman's employer.

II. (a) The lower courts erred by applying Pennsylvania law since the measure of damages for lost future wages under this federal maritime cause of action should have been determined as a matter of federal law.

The second point for review is Petitioner's contention that the District Court should not have applied the Pennsylvania rule of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) in assessing damages in this maritime action. The case held that:

> "Moreover, we find as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting. Thus, the courts of this Commonwealth are instructed to abandon the practice of discounting lost future earnings."

Petitioner submits that *per se* application of state damages law to a federally created right violates the constitutional mandate of uniformity under Article III, §2, and frustrates Congress' intent that maritime matters be resolved as a matter of federal law. Alternatively, assuming that the District Court merely borrowed the underlying theory of *Kaczkowski, Pfeifer* cannot stand because *Chesapeake & Ohio Railway Co. vs. Kelly*, 241 U.S. 485 (1916) requires that damages for lost future earnings be reduced to present value. If inflation is to be considered, Petitioner submits that the evidentiary rule adopted by the Eighth Circuit in *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) should be adopted as the proper guideline. The lower court in that case disallowed expert testimony directly predicting a particular future inflation rate and allowed, instead, expert testimony on future wage increases of a particular group of employees. The Trial Court then instructed on reduction to present value. Thus, the jury's considerations involved a specific

group of employees in a specific geographic area, rather than being harnessed with speculative rates of inflation and other collateral problems.

Petitioner respectfully disagrees with the Court of Appeals' determination that the District Court applied the proper federal law and federal measure of damages. *Pfeifer*, 678 F.2d at 456-7. An examination of Judge Cohill's conclusions of law reveals that the learned judge felt bound by and compelled to apply the recently enunciated rule of damages set forth in *Kaczkowski*. Referring to Respondent's proffer of cost of living raises, the judge stated that these projections were "inappropriate in view of the holding in *Kaczkowski*" and that it "would be inconsistent with the *Kaczkowski* decision" to consider cost of living increases. Joint App. at 74, 75. The Court of Appeals' finding that the lower court did not actually apply state law is contrary to the lower court's stated conclusions of law and, therefore, should not distract this Court from examining on the merits, the propriety of applying state damages law to a cause of action under the LHWCA. Further, even if this Court were to conclude that state law was not applied, it is respectfully submitted that the lower courts were wrong in allowing this measure of damages.

Because this cause of action arises under the maritime law, the damages issue should be decided under federal rather than state law. *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1971), *cert. denied*, 402 U.S. 987 (1971); *Canova v. Travelers Insurance Co.*, 406 F.2d 410 (5th Cir. 1969), *cert. denied*, 396 U.S. 932 (1969). This Court has long recognized that the Constitution has specifically placed maritime torts under national power to control "its substantive as well as its

procedural features ***." *Panama R. Co. v. Johnson*, 264 U.S. 375 ( ). In *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875), this Court recognized that the framers envisioned a uniform and consistent system of maritime law under which commerce between the states and with other nations would proceed without interference. The holding in *Pfeifer* mandates that the measure of a longshoreman's recovery and a shipowner's exposure to liability would depend on the state law of the particular port where the injury occurs or the law of the jurisdiction in which the defendant is otherwise subject to service of process. Petitioner submits that this almost certain inconsistency in the application of maritime law is exactly what the Court has traditionally sought to avoid. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Pope & Talbot, Inc. vs. Hawn*, 346 U.S. 406 (1953).

Petitioner recognizes that this Court has occasionally modified or supplemented general maritime law by applying state law. This is especially true where the federal law of admiralty is incomplete. *Just vs. Chambers*, 312 U.S. 383 (1941); *Southeastern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *M/V Tungus vs. Skovgard*, 358 U.S. 588 (1959); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 ( ). The issue of damage law was settled in *Kelly*. Moreover, this Court has consistently refused to apply state law where it contravenes an act of Congress, prejudices the characteristic features of maritime law or disrupts the harmony it strives to bring to international and interstate relations. *Just*, 312 U.S. at 389-90; *Jensen*, 244 U.S. at 216; *J. Ray McDermott & Co., Inc. vs. Vessel Morning Star*, 457 F.2d 815 (5th Cir. 1972), *cert. denied*, 409 U.S. 948 (1972). Furthermore, state law is inappropriate where it contravenes the uniformity of the admiralty law in some crucial

respect. *In re M/T Alva Cape*, 405 F.2d 962 (2d Cir. 1969); *Branch v. Schumann*, 445 F.2d 175 (5th Cir. 1971).

Referring to the above quoted principles, Petitioner submits that *Pfeifer* cannot stand. First, the legislative history of the 1972 amendments clearly indicates Congress' intent that the legal rate of measure of damages under the LHWCA be calculated according to federal law. In this respect, the Committee stated:

> "The Committee intends that *legal questions* which may arise in actions brought under these provisions [negligence remedy] of the law *shall be determined as a matter of Federal law.*" *S. Rep. No.* 1125 at 12 (1972) (emphasis added).

In light of this language, *Pfeifer* plainly contravenes Congress' intent. Second, the general maritime law is complete in every respect as to damages: *Kelly* requires federal courts to discount an award of lost future earnings to present value and thus, Respondent's reliance on *M/V Tungus* and *St. Hilaire Moye* is misplaced. Finally, the application of state law here would disrupt the harmony which federal maritime law must maintain in order to issue the free flow of commerce. The constitutional uniformity mandate of Article III, §2 could not be clearer.

II. (b) If inflation is a proper consideration in determining the amount of lost future wages, this Court should endorse as a uniform rule the evidentiary approach adopted by the Eighth Circuit Court of Appeals.

Assuming, *arguendo*, that the lower courts merely borrowed the underlying theory of *Kaczkowski*, the time is ripe for a reaffirmation from this Court on the vitality of *Kelly* and its requirement of reduction to present value.

Petitioner contends that *Kelly* continues to be a viable rule, and one which, when applied in conjunction with the approach taken by the Eighth Circuit in *Taenzler v. Burlington Northern, supra*, provides an equitable and judicially managable solution. Since the Fifth Circuit has recently undertaken an exhaustive survey of the federal courts' different approaches to inflation valuation in *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982). Petitioner does not attempt to do so here.

Instead, Petitioner focuses its analysis on two points: First, Petitioner submits that the "total offset" method, commonly known as the Alaskan rule, which was adopted in *Kaczkowski*, represents an inflexible and inequitable approach and one which this Honorable Court should reject outright. Second, the *Kelly* rule remains a viable rule. This Court should reaffirm the concept of discounting to present value. Once the award is received, the plaintiff is responsible for making the proper investments. In any event, Petitioner respectfully submits that at most the Court should endorse the *Taenzler* evidentiary approach instead of entertaining speculative inquiries into future inflationary trends. *Taenzler* permits the fact-finder to evaluate competent evidence regarding *merit and productivity* increases, and then discounts to present value, thereby insuring fairness to both litigants. Further, the fact-finder may also consider the past wage history of the plaintiff together with the past, present and future of the industry of the plaintiff, here, the steel industry.

There was no reason to adopt the Alaskan rule of *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967). Under this rule inflation is *presumed equal* to the discount rate. The Alaska and Pennsylvania Supreme Courts assert that the advantage of this rule is its simplicity, predict-

ability and economy of effort. But, as one of several commentators has observed, this rule "ignores rather than enhances predictability." Note, *Considering Inflation in Calculating Lost Future Earnings*, 18 Washburn L.J. 499, 509 (1979). The rule provides a windfall to the plaintiff because interest rates on relatively safe investments will typically ride several percentage points above the inflation rate. This approach also ignores future probable wage & productivity increases thereby introducing a very great probability of error, since it is common knowledge that the average wage increases of most American workers does not keep pace with the rate of inflation. Depending upon a worker's particular occupation, he will be either penalized or realize a windfall. *Culver*, 688 F.2d at 296-98, N. 21-22.

Finally, this Court should reject the Alaskan rule because it usurps the traditional role of the fact-finder in favor of an inflexible rule of law, and many times the learned court is the fact-finder. There is no great logic in denying the fact-finder the opportunity to examine competent and credible economic evidence of merit and productivity increases when fact-finders have proven to be competent in evaluating medical and other scientific expert testimony. To impose such a rule is to greatly underestimate the intelligence of fact-finders.

The *Taenzler* approach, preserves the traditional role of the fact-finder by permitting competent evidence regarding future wage increases, and then that sum is reduced to present value. In this aspect, *Taenzler* is consistent with this Court's holdings in *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968) and *Kelly, supra*. This approach results in greater accuracy because it keys on the injured claimant's specific *occupation* and *geographic location* in

determining lost future income, while removing from consideration the very speculative prediction of future inflation. The locale and changing conditions are taken into consideration. It is Peititioner's contention that since an injured claimant's potential lost future wages will rarely mirror the inflation rate, a search for an interest rate which incorporates inflation and discount rates is *inappropriate.*

The relevance and ultimate admissibility of economic data to prove the likelihood of future wage loss should depend, as the *Taenzler* court recommends, on the Federal Rules of Evidence. It should be kept in mind that the record in this matter is completely devoid of any evidence of inflation. There was evidence regarding wages paid under union contracts admitted, although plaintiff's Exhibit No. 7 was never admitted into evidence. This Honorable Court must look at the facts in issue in the instant case. The lower court, without the aid of expert testimony, assumed a rigid, inflexible proposition regarding damages. It is submitted that what should be looked at in the review of this case is the factual record from the Court below, in relation to the legal issues raised on this appeal. Ultimately, there are no facts to sustain the Court's legal conclusions.

Conclusion

The Petitioner respectfully requests that this Honorable Court reverse the lower courts' decisions. Based upon a proper interpretation of §905(b) of the LHWCA, this action by Respondent should have been dismissed at the lower court or court of appeals' level.

Should this Honorable Court decide the first issue in favor of Respondent, Petitioner submits it is entitled to a remand to the lower court for a trial on damages, under the proper evidentiary rules and standards.

Dated: November 12, 1982.

Respectfully submitted,

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No. 82-131

In the Supreme Court of the United States

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION,
owner or owner pro hac vice of Barges 1011,
1384, 1400, 1363, and others in a fleet,
Petitioner,

vs.

HOWARD E. PFEIFER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

Brief For Respondent

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QUESTIONS PRESENTED

1. Whether §905(b) of the Longshoremen's and Harbor Workers' Compensation Act permits a longshoreman to sue his employer in negligence as vessel owner, where the employer is acting simultaneously in the dual capacity of vessel owner and of stevedore.

2. Whether the lower court acted within its discretion in utilizing the total offset method in calculating respondent's lost future earnings as the most fair, efficient and comprehensible formula which complies with the principles of the Longshoremen's and Harbor Workers' Compensation Act.

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No. 82-131

In the Supreme Court of the United States

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION,
Petitioner,

vs.

HOWARD E. PFEIFER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief For Respondent

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 678 F.2d 453 (3d Cir. 1982) and is reproduced as Appendix A to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Western District of Pennsylvania has not been reported and is reproduced as Appendix B to the Petition for Writ of Certiorari and in the Joint Appendix. (J.A. 61-78).

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioner, relevant statutory provisions include the following sections of the Longshoremen's and Harbor Workers' Compensation Act:

33 U.S.C. §902 Definitions

When used in this Act... (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

COUNTERSTATEMENT OF THE CASE

Petitioner, Jones & Laughlin Steel Corporation (hereinafter "J & L") appeals from the judgment entered against it on April 15, 1981 in the amount of $275,881.35 less any benefits received by Respondent, Howard E. Pfeifer, (hereinafter "Pfeifer") under the Longshoremen's and Harbor Workers' Compensation Act from October 30, 1980, the date of trial, until the date of payment of the judgment by J & L.

Pfeifer brought this action pursuant to Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) (hereinafter "LHWCA"), to recover damages from J & L for personal injuries sustained as the result of J & L's negligence.

Pfeifer was employed by J & L as a landing helper on its coal barges. At the time of Pfeifer's accident, J & L had a fleet of approximately thirty-five (35) coal barges at its No. 1 landing, which vessels J & L owned, managed and operated, or was owner *pro hac vice* of said vessels. (J.A. 62). On January 13,

1978, Pfeifer slipped and fell because of ice and snow that had accumulated on the gunnel of a barge on which he was working. He struck a barge rail and landed on his tailbone, and a heavy electric motor that he was carrying fell in his lap. He has not returned to work since the accident. He has been examined by a number of physicians, several of whom testified at the trial, and he has undergone extensive physical therapy.

In this non-jury action, the District Court found that J & L was negligent and that its negligence was the proximate cause of Pfeifer's accident and resulting injury. It determined further that Pfeifer was completely disabled from the date of the accident until July 1, 1979, and that thereafter he was capable of doing "light work" and lifting weights of up to twenty-five pounds, but that he could not return to work on the river.

The District Court determined that, as a vessel owner *pro hac vice*, J & L was liable for negligence under §905(b) of the LHWCA. In measuring damages, the District Court declined to consider future wage increases, inflationary effects, or to discount the award to present value, citing *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). The District Court multiplied Pfeifer's 1978 annual wage by his work life expectancy, deducted the amount of compensation Pfeifer had received under the LHWCA, and subtracted his projected earnings at minimum wage from July 1, 1979, until his sixty-fifth birthday.

J & L does not challenge the District Court's findings that J & L was negligent and that its negligence was the proximate cause of Pfeifer's injury, nor does it contend that it was not correctly found to be an owner *pro hac vice*.

SUMMARY OF ARGUMENT

Respondent was properly awarded $275,881.36 in a negligence action against his own employer as a vessel owner *pro*

hac vice under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act. All circuits which have addressed this issue after the 1972 amendments to the LHWCA were in effect have found that an injured employee may assert a cause of action in negligence against a vessel owner which is also the injured party's employer under Section 905(b) of LHWCA. This Court reviewed the LHWCA in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981) and established criteria for negligence as compared to the former criteria of unseaworthiness. The Third Circuit reexamined *Griffith v. Wheeling Pittsburgh Steel Corp.*, 657 F.2d 25 (3d Cir. 1981) following *Scindia* and found that a negligence cause of action against the vessel owner-employer was permitted, which are the precise facts that involved Respondent when he was injured. Further, in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), this Court discussed the same question and recognized that a suit by the injured employee against the vessel-owner was permitted pursuant to the LHWCA. The legislative history to the 1972 amendments of the LHWCA specifically recognizes the existing law, as established in *Reed v. The Yaka*, and Congress worded §905(b) of the Act to preserve the cause of action filed herein by Respondent. Furthermore, a proposed amendment to the Act presently in Congress which makes changes to §905(b), makes no change in the context of the claim of Respondent against J & L presently before this Court. Therefore, a cause of action is available to a longshoreman against a vessel owned or controlled by his employer and the judgment of the Third Circuit must be affirmed.

The lower court utilized the total offset method as a matter of federal law in calculating Pfeifer's future wage loss damages. The Longshoremen's and Harbor Workers' Compensation Act itself has no set method of calculating future wage losses in a negligence action against a vessel. The lower court properly utilized the most efficient and comprehensible

method of calculating damages by including inflation as a factor and offsetting this by eliminating the reduction to present worth by any percentage interest rate. The district court utilized the case of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), which was a Pennsylvania Supreme Court case which adopts the so called Alaska Rule or total offset method. *Kaczkowski* also permits a separate finding for productivity increases, however this factor was not present in the Pfeifer record. J & L failed to present evidence of any nature to support its present argument that expert testimony concerning future interest rates should have been utilized. For this reason J & L has waived any argument contesting the lower court's damages calculation. Even if the argument had been properly preserved, federal law authorizes reference and resort to state law in fashioning a federal measure of damages. There is no confusion or conflict among the circuits on the issue of whether future inflation is to be considered. The issue is whether or not a standard method of calculation should be utilized or whether each circuit is permitted to continue to utilize the method it determines to be most appropriate. Respondent has set forth calculations, comparing various methods showing that the total offset method does not necessarily produce the highest possible verdict to the plaintiff. However, Respondent urges that this Court adopt it because it is the most simple, efficient, predictable and least expensive for parties to utilize. Furthermore, the differences in utilizing other methods are not necessarily significant. The total offset method has been cited and followed in other types of cases with satisfactory results and represents the most predictable, efficient and just method of calculating lost future earnings.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN ALLOWING PLAINTIFF TO PROCEED IN A NEGLIGENCE ACTION AGAINST HIS OWN EMPLOYER AS A VESSEL OWNER *PRO HAC VICE* UNDER SECTION 905(b) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

In the case *sub judice*, the Third Circuit's decision, which affirmed that of the District Court, is clearly correct and in accordance with applicable decisions of this Court and of federal appellate courts.

It has been conclusively established by the federal courts of appeal that an injured longshoreman may assert a cause of action in negligence against a vessel owner which is also the injured party's employer under Section 905(b) of the LHWCA. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976), *on appeal after remand*, 610 F.2d 116 (3d Cir. 1979), *vacated sub nom. American Commercial Lines, Inc. v. Griffith*, 451 U.S. 965 (1981), *reinstated on remand*, 657 F.2d 25 (3d Cir. 1981), *cert. denied*, 102 S.Ct. 1767 (1982); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977).

Griffith v. Wheeling Pittsburgh Steel, supra, established that a longshoreman employee may sue the vessel pursuant to 33 U.S.C. §905(b), notwithstanding the fact that the vessel is owned, directly or *pro hac vice* by his employer.

The lower court's conclusions of law are correct. Judge Cohill's opinion states:

> In 1972, Congress amended the Longshoremen's and Harborworkers' Compensation Act of 1927 (hereinafter "LHWCA"), 33 U.S.C. §§901-950, fundamentally changing the basis for a longshoreman's action against a vessel

> owner. Under the Act as amended, a vessel owner is no longer strictly liable for a longshoreman's injuries on the basis of unseaworthiness or nondelegable duty, or for a stevedor's negligence under a *respondent superior* theory. Instead, "an owner [is] liable to an injured longshoreman only for its own negligence that proximately caused the injury." (citations omitted).
>
> The Third Circuit has held that '[Section] 905(b) imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case' that would be applicable to a land based business.' (J.A. 71, 72).

The Third Circuit considered new briefs and additional opinions filed in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and concluded that its prior judgment in *Griffith* was consistent with the Supreme Court's interpretation of Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905(b), and should be reinstated.

Judge Gibbons, in reinstating the judgment in *Griffith*, held that the facts in *Scindia* were clearly distinguishable from the facts in *Griffith* and accordingly *Scindia* would be clearly distinguishable from this case. He restated the three criteria contained in the District Court's fourth conclusion of law in *Pfeifer*, that is: (1) that the vessel knew or by exercise of reasonable care could have discovered the condition on board ship that lead to the injury; (2) that the vessel knew or should have known that the condition would impose an unreasonable risk of harm to longshoremen working on board the ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger. *Griffith*, 657 F.2d at 27.

The lower court in *Pfeifer* found that the defendant, J & L, was the owner *pro hac vice* of the barges in the fleet at its No. 1 landing on January 13, 1978. It applied the standard of care set

forth in *Griffith* to the facts of this case and found that J & L, as owner *pro hac vice* of the barge on which plaintiff was injured, was negligent. (J.A. 72, 73).

In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), *reh. denied*, 444 U.S. 889 (1979), which is not mentioned in J & L's brief, this Court interpreted Section 905(b) as affording a longshoreman a cause of action in negligence in a situation "where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company." 443 U.S. at 264. Justice White, speaking for the Court in *Edmonds*, cited with approval *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967), and *Reed v. The Yaka*, 373 U.S. 410 (1963), noting that, in both cases, it had upheld a longshoreman's *negligence* or unseaworthiness action against the shipowner-stevedore. 443 U.S. at 264 n. 13.

This Court in *Edmonds, supra*, recognized that §905(b) of the LHWCA entitles a longshoreman injured because of the negligence of the vessel to sue the shipowner-employer for damages without regard to his statutory benefits. It discussed the first two sentences of §905(b) in detail. The two sentences state:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. 33 U.S.C. §905(b).

This Court commented:

> the [first] sentence neither expressly nor implicitly purports to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame.
>
> The second sentence of the paragraph is expressly addressed to the different and less familiar arrangement where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company—in short, to the situation where the ship is its own stevedore. *Id.* at 264.

This Court did not distinguish between employer or non-employer vessel owners in recognizing the existence of a cause of action in negligence against a longshoreman's employer-vessel owner. It held that:

> This is said to be preposterous and contrary to the legislative intent to treat the vessel that provides its own stevedoring services just like other shipowners when and if it negligently causes injury in its capacity as a shipowner and just like other stevedores when it negligently injures in the course of providing its own loading or unloading services. *Id.* at 265.

This Court concluded:

> The second sentence means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself,

which are precisely the facts in this case. *Id.* at 266. In its decision, this Court expressly interpreted the 1972 Amendments as "preserv[ing] the longshoremen's tort action against shipowners acting as shipowners." *Id.* at 264 n.12.

The legislative history of the 1972 Amendments of the LHWCA, as reflected in H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698-4705, indicates that one of the most controversial and difficult issues which the Committee had been required to resolve in connection with this bill concerned the elimination of the unseaworthiness remedy. It was concluded that given the improvements in compensation benefits which this bill would provide, it would be fair to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels that third party claims were to be predicated on negligence rather than the no-fault concept of seaworthiness. *Id.* at 4703. This would place vessels in the same position, insofar as third party liability is concerned, as land based third party and non-maritime pursuits. The Committee report states that actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land based person providing a safe place to work. *Id.* at 4704.

> The Committee has also recognized the need of special provisions to deal with a case where a longshoremen, shipbuilder, or repairman is employed directly by the vessel. In such case, notwithstanding the fact the vessel is the employer, the Supreme Court in *Reed v. S. S. Yaka*, 373 U.S. 410, (1963); and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371, (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes the rights of an injured longshoreman, shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor.... The Committee's intent is that the same principles should apply in determining the liability of the vessel which employes its own longshoreman, shipbuilders or repairman as apply when an independent contractor employs such persons." H.R. Rep.

No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4705 (footnotes omitted).

In *Reed v. The Yaka, supra*, this Court stressed that the liability of the ship or its owner should not depend on the status of the longshoreman's employer. The logic of this result is apparent from the facts of the instant case itself. There were approximately 35 barges in the fleet when Pfeifer was injured. (J.A. 62). Not all were owned by J & L. For that reason, J & L's liability was founded on liability as owner *pro hac vice* of the barges, as authorized by §902(21) of the LHWCA. Such liability is designed to afford an injured longshoreman such as Howard Pfeifer the opportunity to recover damages in a third party negligence action, in cases where the actual owner of the barge in question cannot necessarily be proven. It would be preposterous, contrary to the legislative intent as stated in *Edmonds* and discriminatory treatment to a stevedore to deny his cause of action if the happenstance of his fall occurs on an employer-owned vessel, yet affirm his cause of action if he falls on a non-employer-owned vessel in the same fleet. Unless this reasoning is followed, there would be no logic in Congress' including *pro hac vice* in its definitions of vessel at 33 U.S.C. §902(21). Clearly such an anomolous result was never intended by Congress when the 1972 Amendments were passed and the logic underlying *Reed* and *Jackson* was expressly approved. *See Chiasson v. Rogers Terminal & Shipping Corp.*, 679 F.2d 410, 414 (5th Cir. 1982) (where injury to longshoreman is due to negligence of shipower-employer in non-stevedoring operations, Section 905(b) does not act as bar to recovery); *Griffith*, 521 F.2d 31 (employer has two different liabilities—one as owner and operator of vessel, one as stevedore company which in *latter* case has liability only for compensation).

When the 1972 amendments to the Act were enacted, they dealt with four considerations (1) the level of benefits, (2) extension of coverage to additional workers, (3) third party

suits against persons other than the employer, and (4) administrative matters. In general, compensation benefits payable by the employer to the injured worker were increased, and as a tradeoff to stevedoring employers, the liability imposed on shipowners and stevedores under the doctrines enunciated in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) was expressly overruled. There is nothing else in the Act benefiting the employer to the detriment of the employee, as J&L argues. To the contrary there was absolutely no attempt to modify the express ruling of the *Yaka* decision with its approval of third party actions against employer-vessel owners. *See* Franco, *The Vessel as Employer Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act—The Yaka Lives On*, 23 Loy.L.Rev. 571, 576 (1977).

As Pfeifer urges, the legislative history establishes that Congress was well aware of the Supreme Court actions in this area, and in considering these decisions, Congress had to and did face the question whether in the 1972 revisions here under review, Congress should make any distinction between injured harborworkers employed on one hand by independent contractors and those employed by the vessel owner directly. It chose, in effect, legislatively to adopt (or ratify) the Supreme Court's *Yaka-Jackson* choice. *Chiasson v. Rogers Terminal and Shipping Corp.*, 679 F.2d at 414. *See Lorillard v. Pons*, 434 U.S. 575 (1978) (Congress is presumed to be aware of judicial interpretation of statute and to adopt that interpretation in new law to extent new law incorporates prior law); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, ____ U.S. ____, 102 S.Ct. 1825 (1982) (evaluation of Congressional intent must take into account its contemporary legal context). Had Congress in 1972 intended to go further, and to modify existing Supreme Court precedent by eliminating third party actions against employers, it would have expressly done

so, as was specifically done with the legislative overruling of the *Sieracki* and *Ryan* cases. Congress' failure to do this, despite its clear awareness of the *Reed* and *Jackson* doctrine and its express reference to those cases in the co.itemporaneous legislative history to the amendments, reveals a clear intent on the part of Congress to preserve the injured longshoreman's negligence cause of action against a vessel owner-employer. *Lorillard v. Pons, supra; Lewis v. United States,* 663 F.2d 889 (9th Cir. 1981). Furthermore, J & L's contention that the "exclusive liability" provision of §905(a) serves to preclude Pfeifer's action against the vessel owner here totally ignores the fact that the language utilized by Congress in §905(a) is identical to the exclusivity language which the Supreme Court, in interpreting §905 of the 1927 Act, had held did *not* preclude a third party action in negligence against an employer-vessel owner. *Reed v. The Yaka, supra; Jackson v. Lykes Bros. Steamship Co., supra.* Since Congress in 1972 was aware that this exclusivity language was not being interpreted as precluding third party actions against negligent employers, J & L cannot seriously argue that by reenactment of this language in identical form in 1972, Congress intended to effect a change in the law.

Legislation is currently pending before Congress attempting to amend Section 905(b) to bar negligence actions brought by shipyard employees against their employers. *See* S. Rep. No. 97-498, 97th Cong., 2nd Sess. 4, 19, 31-33, 50 (1982); 128 Cong. Rec. 9213 (daily ed. July 27, 1982). Significantly, the proposed amendment only affects shipyard employees, i.e. ship repairman, shipbuilder, or shipbreaker. None of these classifications fit Pfeifer's status of Barge Landing Helper. (J.A. 62). Interestingly, the Committee Report discusses *Griffith v. Wheeling Pittsburgh Steel Corp.*, but does not recommend its overrule by legislation, and in fact accommodates its ruling in the future amendment. *Id.* at 32-33. The proposed Amendment validates Pfeifer's argument that any change in the LHWCA should be done by Congress, and that the

LHWCA as presently enacted was properly applied by the lower court. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Specifically, had Congress intended in the 1972 Amendments to bar actions by longshoremen against negligent employers as vessel owners, there would have been no need to amend the LHWCA to forbid actions by shipyard employees against their employers under the proposed 1982 Amendment. Furthermore, by reflecting a possible change in attitude in 1982, and a desire to bar *certain* negligence actions heretofore available under the 1972 Amendments, Congress has demonstrated a clear understanding that the 1972 Amendments did not bar negligence actions by longshoremen against their employers as vessel owners, and that even in 1982, there is no intention to bar a cause of action by a longshoreman such as Howard Pfeifer who falls outside the class of shipyard employees as defined in the proposed legislation. Although not controlling in terms of ascertaining Congressional intent at the time of passage of the 1972 Amendments, this subsequent legislative history is a useful aid in ascertaining legislative intent. *Id.* at 118 n. 13; *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980). Further, when coupled with the 1972 legislative history discussed, it clearly indicates Congressional intent to afford Pfeifer a cause of action here.

Had Congress intended through the 1972 Amendments to eliminate third party actions against vessel-owner employers under §905(b), Congress would have expressly done so in language akin to the proposed legislation currently pending before Congress. Furthermore, even assuming Congress now intends through the 1982 proposed legislation to modify existing law and to bar certain negligence actions against vessel-owner employers, the fact that this legislation is restricted to shipbuilders, repairmen and shipbreakers indicates that Congress has no intention of changing the existing law with respect to longshoremen such as Howard Pfeifer who fall outside this category. Nor has Congress ever evidenced any dissatisfaction

with the present interpretation of the Act nor attempted at any time to eliminate all causes of action by longshoremen against their vessel-owner employers. Clearly, had the provisions of the LHWCA as heretofore interpreted been unacceptable and contrary to the legislative intent, Congress would have amended the Act in a fashion far different than the 1972 Amendments, and would clearly have taken action to amend the Act in the wake of the *Griffith* and *Napoli* decisions which were announced as many as seven years ago. *See Lewis v. United States, supra* (Congressional silence in wake of Supreme Court's *Feres* decision, barring governmental liability for service-related injuries to military personnel, and Congress' failure to amend Federal Tort Claims Act in response to decision, was viewed as affirmance of doctrine enunciated therein).

J & L incorrectly argues that there is a sharp division among the federal courts of appeal on this issue; to the contrary, a review of the decisions cited by J & L demonstrates the absence of any conflict in the circuits. *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir 1976), and *Arvidson v. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972), *cert. denied*, 409 U.S. 983 (1972), cited by J & L, both involved interpretations of the LHWCA *prior* to the 1972 Amendments to the Act, and in no respect control the issue of J & L's liability under §905(b) of the 1972 Act. Furthermore, the interpretation of the pre-1972 LHWCA in *Murphy* is entirely dictum because the First Circuit was without a sufficient record to determine whether the injured employee was covered by the LHWCA or whether the applicable state workman's compensation statute controlled. 545 F.2d at 237, 240-241. *Murphy* and *Arvidson* are further distinguishable in that the employees in question had been compensated under the state workman's compensation law, rather than the LHWCA, as in the case *sub judice*. Arvidson is still further distinguishable because it did not involve a vessel in navigation.

The remaining cases cited by J & L on this issue, *Houston v. Bechtel Associates Professional Corp.*, and *O'Rourke v. Long*, do not reflect the decisions of any federal court of appeals, and therefore present no conflict with the well-established decisions of the Second, Third and Fifth Circuits. *Houston v. Bechtel Associates Professional Corp.*, 522 F.Supp. 1094 (D.D.C. 1981) is also distinguishable because no vessel was involved and the claim was solely for punitive damages. *O'Rourke v. Long*, 41 N.Y.2d 219, 391 N.Y.S.2d 553, 359 N.E.2d 1347 (1976) involved a ten year old newspaper carrier's compensation claim, in no respect involved interpretation of the LHWCA, and surely cannot be relied on as a basis for interpreting the 1972 Amendments here.

There is no indication in either the language or legislative history of the amended Longshoremen's Act that vessel owners who serve in the dual capacity of stevedore-employers are to be treated differently than any other owners. If the goals of the legislators are to be fulfilled, both categories of owners must bear equal responsibility for the consequences of their negligence as owners. Congress did not, as Petitioner argues, write an act making all owners equal, but providing that some owners are more equal than others.

The same arguments raised by J & L concerning the 1972 LHWCA amendments were carefully considered in *Griffith, supra*. The Third Circuit's interpretation of §905(b) affording Pfeifer a cause of action in negligence against J & L properly represents the holding which has been rendered by all circuits which have addressed the issue, is fully supported by this Court's decision in *Edmonds*, is in complete conformity with the legislative history underlying the 1972 Amendments, and has not been challenged by any controlling decision of the Federal Courts of Appeal. Therefore, a cause of action in negligence is available to a longshoreman against a vessel owned or controlled by his employer and the judgment of the Third Circuit must be affirmed.

II. THE LOWER COURT PROPERLY APPLIED THE TOTAL OFFSET METHOD AS A MATTER OF FEDERAL LAW IN CALCULATING PFEIFER'S LOST FUTURE EARNINGS DAMAGES.

After determining that Pfeifer had stated a valid cause of action in negligence against J & L as vessel owner, and that J & L's negligence had caused Pfeifer serious injuries, the district court thereupon calculated Pfeifer's damages award. In arriving at this award, the court based its calculations on the finding that Pfeifer was completely unable to work from January 13, 1978, the date of the accident, to July 1, 1979. After July 1, 1979, the lower court found that Pfeifer was capable of doing light work in his reduced capacity from July, 1979, until his presumed date of retirement on his 65th birthday, June 27, 1990. Multiplying Pfeifer's annual wage at the time of the accident in 1978 of $26,025.00 by Pfeifer's work expectancy of 12.5 years, the court calculated Pfeifer's projected earnings at $325,312.50, without regard to inflation or cost of living increases. The court then reduced its figure by $66,352.00, representing Pfeifer's projected earnings at minimum wage over the eleven year period during which Pfeifer was found capable of performing light work. To this figure, the court added $50,000 to compensate Pfeifer for pain and suffering sustained. The court then reduced the amount by the amount of compensation paid to Pfeifer from the date of injury to the date of trial, arriving at a final damages award of $275,881.36.[1]

[1]The Court's calculations were as follows:

$325,312.50	projected earnings at present wage
- 66,352.00	projected earnings at minimum wage
$258,960.50	
+ 50,000.00	pain and suffering
$308,960.50	judgment
- 33,079.14	less compensation paid to date of trial
$275,881.36	final judgment less any compensation paid from date of trial to date of payment. (J.A. 77).

In arriving at this calculation, the district court applied what has been described as the total offset method of calculating damages, as originally developed by the Supreme Court of Alaska in *Beaulieu v. Elliott*, 434 P.2d 665 (Ala. 1967), and as approved and adopted by the Supreme Court of Pennsylvania in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). This method of calculation was developed to consider the fact that inflation has been present in the United States since 1950 and has been suggested to be a common continuing characteristic of modern economics. The total offset method assumes as a matter of law that the discount rate for prospective damages will offset the rate of inflation. *Beaulieu v. Elliott, supra.*

The presence of inflation plays two distinct roles in an award for prospective damages. The first role is determining the impact of inflation on the future earnings of the victim. The second is in determining the appropriate interest rate to discount the future damage award to present value. *Kaczkowski v. Bolubasz*, 491 Pa. at 565 n.4, 421 A.2d at 1029 n. 4 (1980). This court in *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 494 (1980), held that other aspects of a damage award computation, specifically including future inflation "are also matters of estimate and prediction." The Third Circuit in *Pfeifer* solved the problem of estimate and prediction when it held:

> It [the total offset method] makes a judgment—evaluative to be sure, but no better or no worse than the varying prognostications of expert witnesses—that the rate of future inflation will be equivalent to future interest rates. 678 F.2d at 461.

The total offset method is particularly appealing when compared with other approaches in the contexts of predictibility, efficiency and accuracy. *See* W.T. McGough, Jr., *Future Inflation, Prospective Damages and the Circuit Courts*, 63 Va.L.Rev. 105, 125 (1977). There is no argument at this time that both future inflation and future interest rates co-vary

significantly and depend on each other. *See Inflation: A Survey*, 85 Econ.J. 741, 788 (1975); Gibson, *Interest Rates and Inflationary Expectations: New Evidence*, 62 Am.Econ.Rev. 854 (1972). Relying on extensive economic literature on the subject , the court in *Kazskowski* found the total offset method superior to other methods of damage calculation in terms of efficiency and predictibility, and equal, if not superior, in regards to accuracy of result. It was for these sound policy reasons that both the district court and the Third Circuit approved application of the total offset method in calculating Pfeifer's damages. Both courts recognized that there is imprecision in determining correct future rates and there is no perfect solution. Because precise prediction of the real rate of interest may not be possible, the cost of this uncertainty should be imposed upon the culpable, not the innocent party. *Kaczkowski*, 491 Pa. at 582, 421 A.2d at 1038; 63 Va.L.Rev. at 132.

There exists no great confusion or conflict among the circuits as to the issue of future inflation and the extent to which the effects of inflation should be taken into account in calculating damage awards. To the contrary, the vast majority of jurisdictions have held that future inflation is properly to be taken into account in calculating loss of future earnings. *Doca v. Marina Mercante Nicaraguense, S. A.*, 634 F.2d 30 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977); *United States v. English*, 521 F.2d 63 (9th Cir. 1975); *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975); *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974) (decided under FELA as a matter of federal damages law); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982); *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982). Significantly, even the Fifth Circuit, which had previously

prohibited the introduction of evidence concerning the effects of inflation or lost future income, has reversed its position and now allows inflationary factors to be considered in maritime personal injury actions. *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982); (en banc), *overruling Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.) (en banc).

There is a certain commonality among all cases concerning future damages or projected lost earnings. The purpose is to assure the Plaintiff enough money to compensate him in the future for the rest of his working life depending on his physical circumstances and the amount of wages lost as a result of the injury. A fair method must include known and future contractual, cost of living and productivity increases. *Kaczkowski v. Bolubasz, supra.* To this is added the problem of adjusting for inflation and reduction to present value based on the probability that money will earn income in the future at unknown rates. There are many cases on this subject attempting to arrive at a fair result. However, the intricacies and applications of so many theories have failed to arrive at a common method of calculation. The leading cases are *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D.Conn. 1974), *aff'd*, 524 F.2d 384 (2d Cir. 1975); *Doca v. Marina Mercante Nicaraguense, S.A., supra; Culver v. Slater Boat Co., supra; and Pfeifer v. Jones & Laughlin Steel Corporation, supra.*

Doca adopted a two percent (2%) reduction to present worth, which in that Court's opinion reflected a difference between inflation and earning power. The Petitioner, J & L, requests an adoption of *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979), which discusses the admissibility of expert testimony by economists projecting the level of future wage increases, cost of living increases, and future interest rates again using uncertain predictions. Most of the cases cite *Chesapeake and Ohio Railroad v. Kelly*, 241 U.S. 485 (1916) opining that a reduction to present worth is required. There is no argument with that. *Kelly* was cited and followed by the Third

Circuit in *Pfeifer*, 678 F.2d at 461, where the Third Circuit found that the total offset method embodies the continued requirement of reduction to present worth. This Court should recognize that *Kelly* in its own words stated: "We are not in this case called upon to lay down a *precise rule or formula* and it is not our purpose to do this." 241 U.S. at 491. (emphasis added). *Pfeifer* in fact utilizes a reasonable and economically sound method by assuming that for purposes of the instant cause of action the future rate of inflation and future interest rates will offset each other. When this result is compared with another method, the total offset method yields results more favorable to the defendant without wandering off on the economic expert trail into the unknown future.

COMPARISON OF PFEIFER'S PROJECTED LOST EARNINGS BY REDUCING TO PRESENT WORTH

Lower Court's (J.A. 77) Findings— Total Offset	This calculation, patterned after *Doca*, includes lost future wages at the time of trial without cost of living increases, reduced by 2% (for 11 years to present worth) plus lost wages to time of trial (Exhibits 2.1, 6, 7, 10) (Ex. J.A. 351-367, 402-405) (J.A. 41-42, 74, 309-312)
$325,312.50	$ 33,722.00 wages at time of trial
- 66,352.00	- 6,848.00 minimum wage offset
$258,960.50	$ 26,874.00
	x .97868 2% factor—11 years
	+ 78,033.00 lost wages to time of trial
	$341,043.00

Therefore, the total offset method gives a result comparable to any other method, and is more acceptable because it is efficient, predictable yet does not require the time, expense and conjecture of introducing opposing experts.

The issue here is not whether the total offset method must be followed as a matter of federal common law in all cases. The issue is simply whether the Third Circuit was correct in approving the trial court's discretionary use of the total offset method as one method of calculating damages. Given that the total offset method is the most efficient method of calculating damages, is easy of application, saves substantial amounts of court time, is predictable in terms of awards and becomes a catalyst for settlement of cases, the action taken below was clearly within the court's discretion, and represented a prudent method of calculating damages.

J & L has cited *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) for the proposition that this case involves a maritime tort, a type of action which the Constitution has placed under the national power to control with respect to its substantive as well as procedural features, and that maritime torts have unique case law covering damages. The fact is that *Hawn* does not address itself to damages in any respect, and the maritime law is in no respect limited in its development to reliance on federal precedent. Thus, it is well established that a federal court may properly borrow substantive state law and adopt it as federal law in calculating an award of damages. *Pfeifer*, 678 F.2d at 457. *See generally D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring). This is particularly appropriate in the instant action where, unlike the antitrust treble damage statute, the LHWCA statute is silent as to the measure of damages to be applied. As a result, the lower court was clearly authorized as a matter of law to look to state law in fashioning a federal measure of damages, and the Third Circuit's decision was fully in accord with applicable federal precedent as established in this Court. *See Imbler v. Pachtman*, 424 U.S. 409 (1976); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Monroe v. Pape*, 365 U.S. 167 (1961); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). *See also Matter of Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981).

Further support for this position is found in the opinion of this Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374 (1959), wherein Justice Frankfurter stated:

> to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce... Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers as they have played joint roles in the development of maritime law throughout our history.

As recognized by the Third Circuit in *Pfeifer*, damages in maritime cases, or in statutory cases against the United States, have consistently followed the state law. *See Downie v. United States Lines Co.*, 359 F.2d 344 (3d Cir. 1966), *cert. denied*, 385 U.S. 897 (1966) (plaintiff injured by tortious conduct of the vessel was entitled to damages commensurate with nature and extent of his injuries, to reimbursement for loss of earnings, past, present and prospective, for any impairment of his earning capacity, for medical expenses incurred and to be incurred and any other economic loss he may have sustained or was likely to sustain, and to redress for his physical injury, including effects thereof, such as pain, suffering, mental anguish, discomfort and inconvenience). This approach is emphasized in the discussion in Gilmore and Black, *The Law of Admiralty*, Ch. VI §6-61, at 468 (2d ed. 1975), which states:

> Between 1950 and 1970 the Supreme Court revolutionized the law relating to maritime personal injury litigation. In the Introductory Note to this long Chapter we suggested that what the Court did in this field was not in any sense an isolated phenomenon or an aberation attributable to half a dozen Justices; it was part and parcel of the judicial revolution which has reshaped our law of civil obligations during the post-World War II period. Not infreqently the

> personal injury cases seemed to present a problem of choice between a federal or maritime law rule and a state common law or statutory rule. The Court never allowed itself to become doctrinaire or inflexible on this issue. State law rules which were not inconsistent with the Court's reformulation of the substantive law were allowed to continue to influence the results in litigation. The federal solution was reserved for cases in which results consistent with the reformulated substantive law required the application of an old-or the fashioning of a new-rule of maritime law. The Court's business is deciding cases, not spinning out symmetrical webs of jurisprudential theory. The opinions delivered in the sequence of cases we have been discussing may occasionally offend logician but should not offend lawyers. In that respect the post-*Moragne* era is not likely to be greatly different from the pre-*Moragne* era.

In addition, it should be noted that J & L's argument that the court below improperly applied the total offset method as a matter of state law is plainly without merit. The Third Circuit expressly found that the district court applied the total offset method as a matter of federal law in calculating damages. 678 F.2d at 456-457. The Third Circuit further found that J & L had failed to properly contest the application of the total offset method below, thereby waiving any argument to the effect that the total offset approach had been applied as a matter of state law. *Id.*

Besides having waived the above arguments, J & L has also waived any argument concerning the lower court's application of the total offset method, by failing to introduce any evidence at trial in support of the reduction of the damages award to present worth. In order to secure an award under the guidelines presently adressed by J & L, Petitioner was required by Local Rule 5 II 2(b) of the United States District Court of the Western District of Pennsylvania to file a copy of an expert

report with the substance of the facts, findings, opinions and a summary of the grounds or reasons for the opinion of any expert it expected to call as a witness at the trial. J & L failed to list any expert witness (J.A. 20-22), failed to offer or introduce any evidence in support of the application of a discount rate, and failed to supply any basis for the purported proper discount rate to be applied. J & L's citation of *Chesapeake & Ohio Railway Co. v. Kelly, supra,* is misleading in the context that evidence had to be offered by it in support of reduction to present value. Argument without evidence is precluded on appeals such as this. *Skill v. Martinez,* 677 F.2d 368, 371 (3d Cir. 1982).

Unlike J & L, which offered no evidence as to the proper calculation of damages, Pfeifer, in his supplemental pre-trial statement (J.A. 24, 25), set out in detail lost earnings, known contractual increases and variations in his wage classification. Pfeifer's Exhibits 2.1, 6, 10 concerning his wages to time of trial were admitted (Ex. J.A. 351-367, 402-405), Exhibit 7, concerning future union contract wage increases, was marked and offered into evidence with ruling reserved (Ex. J.A. 359) and testimony of the contents of the contract was admitted through witness Pingree (J.A. 302-313). The lower court did not disagree with Pfeifer's damage projections or testimony, but felt they were inappropriate in view of its application of the total offset method (J.A. 74).

Under the above circumstances, J & L's argument in support of remanding this case to the district court to receive expert testimony on the issues of inflation, cost of living increases, and future interest rates is without merit because J & L failed to present such evidence, and preserve its objection. In addition, the Court below properly applied the total offset method, which is consistent with the existing federal maritime law, is in total conformity with the remedial and compensatory goals of the LHWCA, and which represents an

economically sound, efficient, accurate, just and predictable method of determining an injured longshoreman's lost future earnings.

CONCLUSION

Pfeifer's cause of action against a vessel owned or controlled by his employer, J & L, is valid. The damages were properly calculated in accordance with federal law. The judgment of the Third Circuit Court of Appeals must be affirmed.

Respectfully submitted,

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MOTION FILED
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No. 82-131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION
owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,
Petitioner

v.

HOWARD E. PFEIFER,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF ALCOA STEAMSHIP COMPANY, INC., ET AL. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Alcoa Steamship Company, Inc., American President Lines, Ltd., American Trading Transportation Co., Inc., Apex Marine Corp., Central Gulf Lines Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation, Keystone Shipping Company, McAllister Brothers Inc., Newport Tankers Inc., Off-Shore Services Corporation, Ogden Marine Inc., Prudential Lines, Inc., Puerto Rico Marine Management, Inc., Sabine Towing & Transportation Co., Inc., Sea-Land Service, Inc., Seatrain Lines Inc., SunExport Inc., Sun Transport, Inc. and Trinidad Corporation hereby respectfully move for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of amici curiae in this case arises from their ownership and operation of many vessels engaged in interstate and foreign commerce and their exposure to personal injury actions subject to the rule of damages announced in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982). The interests of amici curiae may not be represented properly before this Court due to the limited involvement of the petitioner and respondent in interstate and foreign commerce. By reason of their familiarity with the maritime law of the several federal jurisdictions through which the vessels of amici curiae pass in interstate commerce, amici curiae are qualified to present to this Court a thorough exposition of the far-reaching effects of the *Pfeifer* decision.

WHEREFORE, Alcoa Steamship Company, Inc., American President Lines, Ltd., American Trading Transportation Co., Inc., Apex Marine Corp., Central Gulf Lines Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation,

Keystone Shipping Company, McAllister Brothers Inc., Newport Tankers Inc., Off-Shore Services Corporation, Ogden Marine Inc., Prudential Lines, Inc., Puerto Rico Marine Management, Inc., Sabine Towing & Transportation Co., Inc., Sea-Land Service, Inc., Seatrain Lines Inc., SunExport Inc., Sun Transport, Inc. and Trinidad Corporation respectfully request leave of this Court to file the attached brief amicus curiae.

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BRIEF AMICUS CURIAE OF ALCOA STEAMSHIP COMPANY, INC., ET AL.

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INTEREST OF THE AMICI CURIAE

Alcoa Steamship Company, Inc., American President Lines, Ltd., American Trading Transportation Co., Inc., Apex Marine Corp., Central Gulf Lines Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corporation, Keystone Shipping Company, McAllister Brothers Inc., Newport Tankers Inc., Off-Shore Services Corporation, Ogden Marine Inc., Prudential Lines, Inc., Puerto Rico Marine Management, Inc., Sabine Towing & Transportation Co., Inc., Sea-Land Service, Inc., Seatrain Lines Inc., SunExport Inc., Sun Transport, Inc. and Trinidad Corportion are United States flag shipowners and operators whose vessels represent a substantial portion of the United States merchant fleet. Amici Curiae represent the interests of vessel owners and operators who, because of their extensive involvement in interstate and foreign commerce, are directly affected by the decision of the United States Court of Appeals for the Third Circuit in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982), as well as by decisions of other United States Courts of Appeal which are inconsistent with *Pfeifer*. Because of their relatively limited connection with maritime commerce, neither Petitioner nor Respondent can adequately protect the interests of the Amici.

Amici Curiae are vitally concerned with Question Two of this case. They are continually faced with many claims and lawsuits involving the Jones Act, the general maritime law, the Longshoremen's and Harbor Workers' Compensation Act, and the Death on the High Seas Act. If the opinion of the Third Circuit in *Pfeifer* is allowed to stand, and the total offset method is applied to cases brought under the general maritime law and the statutes mentioned above, Amici Curiae's exposure for such death and injury claims will increase by many millions of dollars in future years.

It is the position of Amici Curiae that the judgment of the United States Court of Appeals for the Third Circuit in *Pfeifer v. Jones & Laughlin Steel Corp.* should be reversed.

SUMMARY OF ARGUMENT

This Court should reverse the Court of Appeals' decision in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982) which adopted the total offset method of treating future loss of wages in maritime and FELA death and personal injury actions. Briefly, the total offset method presumes the rate of inflation to be equal to the discount rate and the one cancels the other, thereby precluding evidence of either factor. The ruling in *Pfeifer* is contrary to the express holdings of this Court in *Norfolk and Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980) and *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916) which require reduction to present worth.

Evidence of inflation is too speculative for a charge to a fact-finder and should not be considered when calculating future loss of earnings. Strict adherence to the holdings in *Kelly* and *Liepelt* should be required.

If this Court decides that inflation will always be with us and decides to incorporate inflation into the determination of future loss of wages, then future losses should be determined on the basis of the national average weekly wage and the interest rate prevailing at the time and place of trial. The use of the national average weekly wage will provide for nationwide uniformity and the use of the interest rate at the time and place of trial will best suit the needs of the claimants and involved industries.

The total offset method is not only contrary to the holdings of this Court in *Liepelt* and *Kelly*, but runs afoul of the statutes involved, in that it goes beyond the loss of pecuniary benefits standard set forth in the Jones Act

and the Federal Employers' Liability Act by conferring excess monetary benefits on plaintiffs. This Court should reaffirm its holdings in the *Liepelt* and *Kelly* cases, but if inflation is to be a factor for consideration then this Court should articulate a rule for determining future loss of wages based upon the national average weekly wage and the prevailing interest rate at the time and place of trial.

ARGUMENT

I. This Court Should Reaffirm the Continuing Vitality of the Federal Rule Requiring Reduction of Future Damages to Present Worth.

A. *The Decision in Kelly*

The federal rule requiring reduction to present worth laid down in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916), was recently affirmed by this Court in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980). In *Kelly*, a death action, suit was filed pursuant to the Federal Employers' Liability Act (FELA) of April 22, 1908, 45 U.S.C. §51 *et seq*. On review by writ of error, this Court addressed the trial court's instructions with respect to computation of damages. Of significance, the trial court rejected a request for charge submitted by the defendant which would have directed the jury to "fix the damages at a sum which represents the present cash value of the reasonable expectation of pecuniary advantage." *See Kelly, supra*, 241 U.S. at 488. This Court reversed the Kentucky state courts for failing to instruct the jury to reduce the damage award to present value.

The *Kelly* Court carefully limited its decision by declining "to lay down a precise rule or formula." *Id*. at 491. Instead, the Court indicated several considerations for use as clarifying and guiding influences in future cases. Thus, local conditions were "not to be disregarded" in measuring the anticipated pecuniary benefit, nor was the discount rate to be tied unalterably to the " 'legal rate' of interest." *Id*. at 490. The compensation rate was to be computed on a reasonable basis not requiring the beneficiaries to exercise sophisticated financial acumen and skill. *Accord, Roselli v. Hellenic Lines, Ltd.*, 524 F.Supp. 2 (S.D.N.Y. 1980).

The *Kelly* rule has been followed uniformly in the state and federal courts since its pronouncement sixty-

six years ago. The principle of reducing future damages to present value has been the rule of law applicable not only to FELA cases but to maritime and non-maritime torts as well. In 1971, the Second Circuit recognized that the requirement of discounting future losses to present value in accordance with *Kelly* was in line with so many "familiar and controlling decisions" that extended citation in support of it became "supererogatory". *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 77-78 (2d Cir. 1971) (Friendly, J.), *cert. denied*, 411 U.S. 933 (1973). During the 1970's, as in years past, *Kelly* was routinely cited throughout the circuits as the general rule for cases arising under the FELA, the Jones Act, 46 U.S.C. §688, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (LHWCA), the Death on the High Seas Act, 46 U.S.C. §§761, 762 (DOHSA), and even the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.* (FTCA), in which damage awards are governed by state law. *See, e.g., Yodice, supra*, (LHWCA); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1396 (3d Cir. 1971) (DOHSA); *Downie v. United States Lines Co.*, 359 F.2d 344 (3d Cir.) (*en banc*), *cert. denied*, 385 U.S. 897 (1966) (Jones Act); *Murphy v. National Railroad Passenger Corp.*, 547 F.2d 816, 818 (4th Cir. 1977) (FELA); *Ivy v. Security Barge Lines*, 585 F.2d 732 (5th Cir. 1978), *modified on different grounds*, 606 F.2d 524, 529 (5th Cir. 1979), *cert. denied*, 446 U.S. 956 (1980) (Jones Act); *Blue v. Western Ry. Co. of Alabama*, 469 F.2d 487, 496 (5th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973) (FELA); *Petition of United States Steel Corporation*, 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971) (Jones Act); *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305 (6th Cir. 1969) (FELA); *Beanland v. Chicago, Rock Island and Pacific R.R. Company*, 480 F.2d 109, 114-15 (8th Cir. 1973) (FELA); *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) (FELA); *United States v. English*, 521 F.2d 63

(9th Cir. 1975) (FTCA); *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977) (FTCA).

Kelly has not been cited merely as a matter of routine. Rather, the courts have demonstrated widespread acceptance of the reduction-to-present-value standard in years of recession, depression and subsequent inflation. The economic cycles attendant upon wartime and peacetime economies failed to generate substantive criticism of the principle that the "earning power of money" can be measured by the fact-finder in the calculation of future damages. The wisdom of the flexible standard established in *Kelly* was proven by its continuing vitality during the following decades, and was further underscored by the diverse application of the principle by the state courts in numerous legal contexts. *See, e.g., Watkins v. Ebach, et al.*, 291 N.W.2d 765 (S.D. 1980) (automobile personal injury action, collecting cases); *Thorpe v. Bailey*, 386 A.2d 668 (Del. 1978) (automobile personal injury, collecting cases); *Lumber Terminals Inc. v. Nowakowski*, 36 Md.App. 82, 373 A.2d 282 (Ct.Spec.App. 1977) (personal injury action, noting application of the rule in breach of contract matters in Maryland "since the turn of the century"); *Tenore v. Nu Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613 (N.J. 1975) (wrongful death action, also discussing historic treatment of inflation by courts of several states); *Plourd v. Southern Pacific Transportation Co.*, 266 Or. 666, 513 P.2d 1140 (Or. 1973) (FELA, recognizing Oregon decisions requiring reduction to present value); *Resner v. Northern Pacific Ry.*, 161 Mont. 177, 505 P.2d 86 (Mont. 1973) (FELA); *Varney v. Taylor*, 77 N.M. 28, 419 P.2d 234 (N.M. 1966) (wrongful death); *St. Louis-San Francisco Ry. Co. v. Tompkins*, 409 P.2d 1 (Okla. 1965) (FELA, application of Oklahoma law); *Mallinger v. Brussow*, 252 Iowa 54, 105 N.W.2d 626 (Iowa 1960) (wrongful death); *Jacobsen v. Poland*, 163 Neb. 590, 80 N.W.2d 891 (Neb. 1957) (automobile accident, personal injury action); *Kellerher v. Porter*, 29 Wash.2d 650, 189

P.2d 223 (Wash. 1948) (automobile accident, death action).

The foregoing cases demonstrate that, historically, state and federal courts have consistently applied the principle of reducing future damages to present value as set forth in *Kelly*.

In recent years, several Circuit Courts of Appeal have examined the question of whether and in what manner juries should consider the impact of inflation on awards for future damages. With the sole exception of *Pfeifer*, every federal court considering inflation has adhered in theory and in practice to the *Kelly* rule. The error committed by the *Pfeifer* court, through its failure to apply in practice the *Kelly* rule, was further compounded by that court's failure to recognize that this Court reaffirmed *Kelly* in the recent decision of *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980).

B. *This Court in Liepelt Recently Reaffirmed The Kelly Rule*

In 1980, this Court reaffirmed the continuing vitality of the *Kelly* rule as the governing standard for measuring damages in personal injury and death cases arising under federal law. In *Liepelt*, the Court was confronted with the question whether evidence of income taxes payable on a decedent's future estimated earnings should be admissible at trial. The Court held that income taxes payable on the decedent's past and estimated earnings must be considered in measuring the actual pecuniary loss to the wage earner's family. The Court stated that a wage earner's after-tax income "provides the only realistic measure of his ability to support his family" and therefore a "wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies." *Id.* at 493-94.

This Court reasoned that the taxability of a wage earner's estimated future earnings is a factor no more

speculative or complex for a jury's deliberations than other matters routinely accepted as evidence bearing upon the pecuniary loss to a decedent's dependents. *Id.* at 494. In support of this reasoning, the Court quoted *Chesapeake & Ohio v. Kelly* and said that "federal courts have consistently . . . required that the estimate of future earnings be reduced by 'taking account of the earning power of the money that is presently to be awarded,' *Chesapeake & Ohio Ry. Co. v. Kelly, supra*, 241 U.S., at 489, . . ." *Id.*

Thus, this Court expressly reaffirmed the *Kelly* mandate requiring reduction of awards for future loss of earnings to present worth in personal injury or death cases arising under federal law, a rule that has never been questioned by this Court. *See, e.g., Gulf, Colorado and Santa Fe R.R. Co. v. Moser*, 275 U.S. 133 (1927); *Western and Atlantic R.R. v. Hughes*, 278 U.S. 496 (1929). Indeed, in *Moser*, which was decided during a period of high inflation, this Court held that failure to instruct the jury in accordance with its language in *Kelly* and to require reduction of an award for future loss of earnings to present worth constituted grounds for reversal.

The matter of *Jones & Laughlin Steel Corp. v. Pfeifer* brings under review by this Court, for the first time since *Liepelt*, the manner in which the lower federal courts and several state courts have treated the calculation of future damages, inflation and interest rates. As will become self-evident, the course of judicial deliberations and pronouncements has been a diverse one, seldom following the same path among the several circuits.

II. Evidence of Inflation Should Not Be Considered When Calculating Future Loss of Earnings.

The decision of the United States Court of Appeals for the Fifth Circuit in *Johnson v. Penrod Drilling Co.*,

469 F.2d 897 (5th Cir. 1972), *on rehearing*, 510 F.2d 234 (5th Cir.) (*en banc*), *cert. denied*, 423 U.S. 839 (1975) was a leading precedent prior to *Liepelt*.

In *Penrod*, the Fifth Circuit convened *en banc* to consider whether evidence of future inflation should be considered in a Jones Act case for the calculation of future damages. The Fifth Circuit took judicial notice that inflation had worsened since the initial panel opinion of November 1972, and recognized that inflation "could . . . become a predictable condition for the future." 510 F.2d at 236. The court continued:

> Nevertheless, with this added light, we still cannot so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages. The worsening of inflation might as readily foretell a recession or a depression as its continuity. Strong governmental counter-measures have been proposed and their efficacy is still unknown. Then too, if future inflation does cause higher taxes, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations. *Id.*

The Fifth Circuit expressly disapproved the trial court's attempt to take into account, in computing the plaintiff's future loss of earnings, "inflationary trends in this nation's economy for the next several decades." *Id.* at 241. The *Penrod* court held that the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination. *Id.* Furthermore, the court ruled that the jury should be instructed to discount any award to present value in accordance with the decision of the United States Supreme Court in *Chesapeake & Ohio Ry. Co. v. Kelly*, *supra*. Thus, *Penrod* joined a significant number of federal

precedents which as recently as 1975 considered evidence of inflation too speculative for a fact-finder's consideration. *See, e.g., Williams v. United States*, 435 F.2d 804 (1st Cir. 1970); *McWeeney v. New York, New Haven and Hartford R.R. Co.*, 282 F.2d 34 (2d Cir.) (*en banc*), *cert. denied*, 364 U.S. 870 (1960); *Frankel v. United States*, 321 F.Supp. 1331 (E.D.Pa. 1970), *aff'd. sub nom. Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972); *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294 (3d Cir. 1972); *Sleeman v. Chesapeake & Ohio Ry. Co., supra; United States v. Furumizo*, 381 F.2d 965 (9th Cir. 1967).

The application of *Penrod* in subsequent cases in the Fifth Circuit resulted in the exclusion of evidence of future wage increases on the basis of merit or productivity, as well as any increases due to inflation. *See generally Culver v. Slater Boat Company*, 688 F.2d 280, 288-92 (5th Cir. 1982) (en banc). This unintended consequence of *Penrod* had the practical effect "to throw the baby of future merit increases out with the inflationary washtub waters." *Id.* at 290.

In *Culver*, the Fifth Circuit, rather than modifying the *Penrod* rule to permit evidence of productivity and merit increases with concomitant reduction to present worth, flatly overruled *Penrod's* prohibition of evidence of future inflation. Significantly, however, the *Culver* majority did not reject — nor could they have rejected — the underlying assumption of *Penrod*, i.e., that future inflation is undeniably a matter of pure speculation. Amici, therefore, submit that the underlying rationale of *Penrod* is still valid and should be adopted by this Court.

The view that future inflation is too speculative to be considered as a factor in awarding future wage losses is not without substantial support today. *Williams v. United States, supra*; *Culver v. Slater Boat Company, supra*, (Clark, Roney, Gee, JJ., dissenting); *Sleeman v. Chesapeake & Ohio Ry. Co., supra*; *Petition of United States Steel Corporation, supra*; *cf. Taenzler v.*

Burlington Northern, supra; but see Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974) (acknowledging that the testimony of the plaintiff's economist as to the existence and rate of inflation for the next 30 years was so speculative as to be inadmissible as evidence, but holding that the trial court erred in affirmatively instructing the jury not to consider future increases or decreases in the purchasing power of money).

In support of the *Penrod* rule, we urge this Court to take judicial notice of the fact that England, with its longer history of continued inflation, to this day refuses to consider evidence of inflation in the calculation of future damage awards. In the leading case of *Young v. Percival*, (1975) 1 W.L.R. 17, 1 Lloyd's Rep. 130, the court ruled that anticipated inflation could best be guarded against by the management and careful investment of the fund of damages awarded. Lord Pearson stated: "I think that protection against inflation is to be sought by investment policy, and that the lump sum of damages should be assessed on the basis that it will be invested with the aim of obtaining some capital appreciation to offset the probable rise in the cost of living." *Id.*; *see Cookson v. Knowles*, House of Lords (1979), 2 All E.R. 604. Furthermore, although pressed with scholarly evidence concerning the manner in which inflation could be placed before the finder of fact, English courts have observed that even if they were persuaded to depart from the principle that prevented introduction of such evidence, "we should be left with no firm or workable principle, or basis of calculation, to put in its place." *Id.*

Most recently in the matter of *Lim Poh Choo v. Camden and Islington Area Health Authority*, House of Lords (1980), 2 All E.R. 910 (1979), the court explained its rationale as follows:

> [T]he better course in the great majority of cases is to disregard [inflation]. And this for several reasons. First, it is pure speculation whether inflation will

> continue at present, or higher, rates, or even disappear. The only sure comment one may make on any financial prediction is that it is as likely to be falsified as to be borne out by the event. Secondly, as Lord Pearson said in *Taylor v. O'Connor* . . . inflation is best left to be dealt with by investment policy. It is not unrealistic in modern social conditions, nor is it unjust, to assume that the recipient of a large capital sum by way of damages will take advice as to its investment and use. Thirdly, it is inherent in a system of compensation by way of a lump sum immediately payable, and, I would think, just, that the sum be calculated at current money values, leaving the recipient in the same position as others, who have to rely on capital for their support to face the future. *Id.*

The inflation experienced in the United States is of more recent origin and has not been as severe as that in Great Britain, yet our federal courts have plunged headlong into "graduate seminars in economics" to predict the future course of inflation without consideration of the British experience. Furthermore, as Judge Gee has aptly observed, "Even the recent history of this young nation reveals that economic cycles come and go — oft times with dramatic, unpredicted swiftness." *Culver v. Slater Boat, supra,* at 314. Similarly, Judge Adams of the Third Circuit, dissenting from the denial of rehearing in *Pfeifer,* observed that "the presence at this time of very high interest rates and substantially reduced inflation would suggest caution in adopting a rule that appears to be premised on some immutable relationship between interest and inflation." *Pfeifer, supra,* 678 F.2d at 462 (Statement of Adams, J.).

Thus, the English courts have recognized the insurmountable difficulties of constructing and applying a rule of law to the vagaries of a national economy. In this country, several distinguished federal judges have ex-

pressed a similar reluctance to define and resolve complex economic problems through traditional jurisprudential analyses. These themes were echoed in the dissenting opinion of Judges Clark, Roney and Gee, who, in *Culver*, contended that *Penrod* represented the most workable "path to justice in jury trials of future damages cases." *Culver, supra*, 688 F.2d at 314. They wrote:

> What is overlooked or misunderstood in casting *Penrod* aside is that its use of the prevailing interest rates at the time and place of trial to discount present awards of future dollars works in terms of market-place realities. No one wins. No one loses. No one speculates. Under *Penrod* the plaintiff's future losses are based on fact, not speculation. The prevailing interest rate is not only simple to prove, but, because it is real and current, it is also available to the plaintiff for the investment of the funds he has received. The majority's speculation that it is not available is just that — speculation. Whatever factors (inflation, money supply and the like) that make the rate high or low for discount purposes are available for investment purposes. If it is not so, then the rate is not the true prevailing rate. *Id.*

In view of the foregoing, Amici respectfully urge this Court to recognize that future inflation is too speculative for competent determination by a fact-finder and to adopt a rule forbidding consideration of inflation as a factor in measuring future loss of earnings.

III. If Inflation Is To Be a Factor, Then Future Losses Should Be Determined by the Application of the National Average Weekly Wage and the Interest Rate Prevailing at the Time and Place of Trial.

If inflation (cost of living increase) is to be considered at all in computing future wage losses, what is needed is a practical way fairly to allow for it, which is

simple and easy of application on a nationwide basis, and which eliminates as much of the speculation inherent in such computations as possible. This is graphically demonstrated by the *en banc* decision of the Former Court of Appeals for the Fifth Circuit in *Culver*,[1] which consists of some 43 pages of various and sundry methods which might be used to forecast future loss of wages attributable to both inflationary and non-inflationary (merit and productivity) factors. Of course, fairness to both plaintiffs and defendants is essential.

First of all, what is it we are trying to replace with a lump sum of money at the time of settlement or trial? It is the amount of wages which the plaintiff will not be able to earn each year for the balance of his work life expectancy because of the injury. We are not trying to replace what the wages he would have earned would not buy for him because of inflation. For example, in the 10 year period 1971-80, the national average weekly wage increased an average of 6.97% per year whereas inflation based on the Consumer Price Index increased an average of 7.87% per year. What a plaintiff loses as a result of an injury is the 6.97% increase in the wages he would have earned, and not the 7.87% inflation increase his wage increases did not equal.

We are trying to place in the plaintiff's hands a lump sum of money which he, as an unsophisticated investor, can invest in reasonably safe investments which will replace in each remaining year of his work life expectancy the wages he will not be able to earn because of his injury. The *Culver* court made this perfectly clear:

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1. The word "Former" is used to indicate the case was heard *en banc* by the Fifth Circuit before it was divided into the present Fifth and Eleventh Circuits on October 1, 1981. A total of twenty-two (22) Circuit Judges participated in the decision from which seven (7) judges dissented. Three (3) additional judges who joined the Fifth Circuit after submission and oral argument chose not to participate and one (1) additional judge was disqualified because he took senior status before the decision was rendered.

> The goal, albeit ideal, is that if the injured worker has a 20-year work-life expectancy, and he invests his lump-sum award in relatively risk-free investments, he will receive in the nineteenth and in the twentieth year roughly the same amount as if he had worked each of those years. The goal is not, it must be made clear at the outset, to *protect* the lump-sum award from the effect of inflation. 688 F.2d at 287.

Over the 33 years from 1948 through 1980 the average increase in the weekly wages of all private non-agricultrual industrial workers in the United States was 5.12% per year. As the *Culver* court recognized, this increase in wages obviously included all the factors that determine such increases, both the non-inflationary (merit and productivity) and inflationary. This one index affords a simple, practical approach to estimating potential future wage increases which is fair to both plaintiffs and defendants.[2] If the percentage increase in the national average weekly wage exceeds the percentage increase of inflation, the plaintiff is compensated on that basis. If it is less than the inflation rate, the defendant is not required to pay for the inflation which an employer would not have paid for had the plaintiff been working.[3]

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2. Congress has utilized such percentage national average weekly wage increases to increase weekly benefits payable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §910(f). The percentage increase is determined each year as of June 30, [33 U.S.C.A. §906(b)(3)] with increases to be effective on October 1 as no lump sum awards are involved under the Longshoremen's Act. The basic concept is the same, although the average increase over a longer period of time must be considered because of the lump sum awards which have to be made in third-party actions.

3. In fact, using the percentage increase in the national average weekly wage of 5.12% is more favorable to the plaintiff, because the increase in the Consumer Price Index (inflation) was only 4.05% over this same period of time.

From the many different approaches articulated and examined in *Culver*, Amici respectfully submit that the following simple and practical approach can be distilled:

1. Determine the annual amount of future wage loss at the time of settlement or trial without considering any potential wage increases in the future. (Assume $10,000.00).[4]
2. Determine from the latest Department of Labor statistics the work-life expectancy of the plaintiff. (Assume 18 years).
3. Determine from the latest Department of Labor statistics the average annual percentage wage increase nationally of all private non-agricultural industrial workers for the same period of years prior to settlement or trial as remains in his work-life expectancy found in Step 1. (Assume 5.12%)
4. Determine the percentage interest rate at which the lump sum award can be invested at the time and place of settlement or trial in substantially risk free investments, such as U.S. Treasury bonds, the interest rate for which is obtainable from the daily newspapers in most large cities. (Assume 10%).
5. Subtract the annual percentage wage increase found in Step 3 from the percentage interest rate found in Step 4. (10% minus 5.12% = 4.88%).
6. The net percentage rate found in Step 5 is the rate at which the projected annual loss of wages found in Step 1 is to be discounted to obtain the present value of the future wage losses to be paid in a lump sum at the time and place of settlement or trial. [$10,000.00 (Step 1) for 18 years (Step 2) discounted at 4.88% (Step 5) has a

4. For illustrative purposes, we are assuming the figures are the same as the figures used by the Fifth Circuit in *Culver*, footnote 49, 688 F.2d at 310.

present value of $117,999.59, which is the substantial equivalent of the $114,232.99 present value figure arrived at by the more complicated calculation in footnote 49, in *Culver*, 688 F.2d at 310].

This is basically a combination of the two methods summarized by the court in *Culver*, 688 F.2d at 308-310, which Amici believe eliminates the unfairness in the Fifth Circuit's two summarized methods and in the total offset method (Alaska rule) adopted by the Court of Appeals below in this case.

Using the first method suggested by the Fifth Circuit, and its figures in footnote 49, the projected loss of earnings for the 18 years totals $284,494.17 which divided by 18 years equals $15,805.23 as the average annual wage loss for each of the 18 years. Discounted at the 10% rate used in footnote 49, the present value lump sum award would be $129,625.20. This is $15,392.21 more than the present value when the 10% discount rate is applied to each year as was done in the calculation in footnote 49.[5]

Under the second method approved by the *Culver* court, the so-called *Feldman* approach, after segregating potential future wage increases based on non-inflationary factors (merit and productivity) from the potential wage increases based on inflationary factors (688 F.2d at 310, Step 5)[6], the future wage loss for each year without inflation is projected and then discounted by the inflation-adjusted discount rate. For these purposes we will

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5. This difference becomes even greater as the number of years of work life expectancy increases. For 25 years, the average annual income is $19,409.73, which discounted at 10% for 25 years has a present value of $176,182.13 which is $37,272.34 more than the present value would be if it is computed as in footnote 49. For 30 years the average annual income is $22,608.10, which discounted at 10% for 30 years has a present value of $212,968.30 which is $60,715.89 more than if it is computed as in footnote 49.

6. One of the strongest reasons the Fifth Circuit articulated for overruling *Penrod* was the inability or impracticability of separating

assume this is 2%, which is approximately what most courts who have looked at it have found it to be.[7] In order to be able to use the figures from footnote 49 for illustrative purposes, let us assume the 5.12% annual increase in wages did not include any amount for inflation and represented only merit or productivity. Under the *Feldman* approach, the inflation adjusted discount rate would be 2% of plaintiff's total loss of future earnings of $284,494.26 which discounted at 2% for 18 years would

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wage increases into inflationary and non-inflationary amounts. The court said:

> . . . although *Penrod* was not intended to eliminate evidence of future wage increases on the basis of merit or productivity, the practical effect of *Penrod* is often to throw the baby of future merit increases out with the inflationary washtub waters. 688 F.2d at 291.
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> . . .an employer may take into account rising inflation in his decision to grant promotions, and it would be impossible for anyone, expert or otherwise, to distinguish that part due to merit *only* and determine the percentage amount of the raise due wholly to non-inflationary factors. 688 F.2d at 292.

The Fifth Circuit does not explain why something that was "impossible"under their *Penrod* decision, suddenly becomes possible by labeling it a part of their *Feldman* approach. 688 F.2d at 310, Step (5).

7. In arriving at this discount rate, *Culver* provides for the full inflationary percentage rate for each of the 40 years from 1940-1980 to be subtracted from the effective interest rate on some safe investment for each of those years to establish a "real rate of interest" for each year. These yearly "real rates of interest" are averaged to obtain the inflation adjusted discount rate. 688 F.2d at 309-310, Steps 1 through 4. Using the full inflationary percentage rate in this way is directly contrary to *Culver's* holding that ". . . the goal is not . . . to *protect* the lump-sum award from the effect of inflation. . . ." 688 F.2d at 287. Despite this unequivocal holding, *Culver* requires the full effect of inflation to be used in its *Feldman* approach in arriving at the inflation adjusted discount rate, which protects in full the lump-sum award from inflation, the very goal or result the Fifth Circuit had condemned earlier in its decision.

have a present value of $230,740.55. This is $116,507.56[8] more than the present value computed in footnote 49, which footnote is supposed to be "essentially a variation of the *Feldman* approach."[9]

The basic problem with the *Feldman* inflation adjusted discount rate is the underlying assumption that the lump sum awarded will be re-invested over the plaintiff's work life expectancy from time to time as interest rates go up or down with inflation. This is not the case; the interest rate which the lump sum award can earn over the assumed 18 year work-life expectancy of the plaintiff is that which exists at the time and place of settlement or trial and which will produce the wages which the plaintiff otherwise would have earned in each of the following 18 years. For example, for the 18th year the income needed to be replaced as projected in footnote 49 is $23,369.58. By investing its present value of $4,183.15 at the assumed 10% interest rate at the time and place of settlement or trial, the desired $23,369.58 will be available in the 18th year and the plaintiff has never had to change his investment. What happens to interest rates over the next 18 years is of no consequence.

Feldman is also substantially flawed, just as the Fifth Circuit held *Penrod* was, because it requires a sep-

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8. See Addendum A to this brief for the computations.

9. If we assume 3% of the average annual increase in wages of 5.12% from footnote 49 is for non-inflationary factors and 2.12% for inflationary factors, the projected future wage loss totals $231,144.30 for the 18 years. Discounted at the *Feldman* inflation adjusted discount rate of 2%, the present value of these future wage losses is $191,946.77 which is $77,713.78 more than the present value as computed in footnote 49 for wage losses totaling $284,494.17. (See Addendum B to this brief which contains these computations). The Fifth Circuit condemns the total offset method (Alaska rule) of the Court of Appeals below as unfair because it "unnecessarily penalizes defendants", 688 F.2d at 299. Here the *Feldman* rule aproved by the Fifth Circuit penalizes the defendant an additional $11,946.77.

aration of anticipated future wage increases based on non-inflationary factors from those which may result from inflation.[10] Amici's proposed method does not require this, but combines in a single percentage figure anticipated wage increases which include all relevant factors, both inflationary and non-inflationary. Since this method is based on Department of Labor statistics, it is easily ascertainable, as is the interest rate at the time and place of settlement or trial. With this type of certainty, the principal objectives of the Court of Appeals below in adopting the total offset method are fully met inasmuch as Amici's method also

> . . . will tend to eliminate the necessity for speculation, to introduce greater certainty into the parties' own calculations, and thereby perhaps to facilitate settlement of personal injury claims without the necessity of judicial intervention . . . 678 F.2d 453, at 461.

The unfairness of the total offset method of the Court below is dramatically demonstrated by referring once again to footnote 49 in *Culver*, 688 F.2d at 310. Under the total offset method, the plaintiff would receive $180,000.00 for his loss of future wages, or $65,767.01 more than the present value of his projected future wage losses over the next 18 years. By investing the full $180,000.00 when he receives it at 10%, plaintiff will have an average of $21,947.44 to spend in each of the 18 years.[11] This will produce total compensation for his lost wages of $395,053.92, which on the facts assumed in footnote 49 is $110,559.75 (38.9%) more than his actual projected loss of wages of $284,494.17. Stated another way, if we assume the same 5.12% wage increase from

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10. See footnote 6, *supra*.

11. Note that under this method, the plaintiff will be awarded for each of the first fifteen years, the same amount that it is projected he would not have earned until the 16th year.

footnote 49, the $180,000.00 payable under the total offset method is enough when invested at 10% to pay the $10,000.00 base wages lost, with the 5.12% yearly increase for nearly 47 years, not for just the 18 years of lost wages which footnote 49 seeks to replace. It should be noted the amount of money received from the $180,000.00 over this 47 year period totals $1,846,150.29, which is more than six times as much as the lost wages of $284,494.17 sought to be replaced in footnote 49.[12]

Amici respectfully submit that their proposed method of calculating future wage increases resulting from both inflationary and non-inflationary factors and reducing the future losses to present value should be adopted because:

1. It is fair to both plaintiffs and defendants.
2. It eliminates speculation to the maximum extent possible.
3. It is simple and easy in its application.
4. It facilitates settlement inasmuch as the calculation of future lost wages is more certain.
5. By utilizing the net discount figure only one mathematical computation is needed [$10,000.00 per year (Step 1) for 18 years (Step 2) discounted at the rate of 4.88% (Step 5) equals $117,999.59].[13]

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12. See Addendum C to this brief in which the computations from footnote 49 are repeated for the first 18 years and then extended on the same basis through the 47th year. As the dollar amounts generated by the $65,767.01 difference between the present value figure in footnote 49 ($114,232.99) and total offset figure ($180,000.00) are staggering indeed, counsel for Amici have had their accuracy confirmed by an independent expert.

13. Please note the present value figure of $117,999.59 obtained using the Amici's method is substantially the same as the $114,232.99 present value figure obtained by the Fifth Circuit in its much more complicated method in footnote 49.

6. In most cases, experienced trial lawyers will be able to agree on the net percentage discount to be used (Step 5), if a case has to be tried.
7. It eliminates the need for the complicated expert economic testimony which is required by the other methods suggested by various courts.

IV. The Total Offset Rule Adopted by the Third Circuit in Pfeifer Should be Rejected by this Court.

Those Circuit Courts of Appeal permitting consideration of future inflation in awards for future damages have not adopted satisfactory methods which distinguish between future wage increases due solely to inflation and those which may or may not occur for reasons independent of inflation. This variance in methods leads to inconsistent results which tend to overcompensate the plaintiff at the expense of the defendant. Amici submit that any method of predicting future loss of earnings which assumes that future wages will rise or fall in direct proportion to a change in the estimated inflation rate is erroneous. A review of the methods adopted by those circuit courts which consider inflation supports the foregoing view.

In *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981), the Second Circuit adopted the inflation adjusted discount rate as set forth by Judge Blumenfeld in *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D. Conn. 1979), *aff'd in part, rev'd in part and remanded*, 524 F.2d 384 (2d Cir. 1975). This rate is determined by subtracting the average annual change in the consumer price index over each of several periods of years from the effective annual rate on government bonds held during each of the same periods, yielding a difference which is the "inflation-adjusted discount rate." Although this method may account for the anticipated effects of future inflation, it erroneously assumes

that future wages will increase in response to and proportionately with the estimated rate of future inflation.

Similarly, in *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982), the Seventh Circuit recognized that there is an inflation adjusted discount rate which approximates the "real rate of interest" in an inflationless world. Although the Seventh Circuit did not prescribe a method for calculating the adjusted future interest rate, Judge Posner suggested that expert evidence, fairly treating the inflationary impact of both future wage increases and future interest rates, should be considered by a jury so long as the result is not unreasonable. 677 F.2d at 1201. However, this approach again assumes that future wage increases will respond directly to estimated future increases in inflation.

We submit that a similar error occurred in *United States v. English*, 521 F.2d 63 (9th Cir. 1975). There, the Ninth Circuit approved a method of considering future inflation whereby a jury would be permitted to hear evidence of estimated future earnings including "postulated changes in the purchasing power of the dollar". 521 F.2d at 76. The court held that the jury likewise should consider evidence of the present value of future loss of earnings. Once again, the *English* approach erroneously assumed that future lost wages would respond directly to estimated future inflation. The *English* approach was adopted by the Tenth Circuit Court of Appeals in *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977).

In *Taenzler*, *supra*, the Eighth Circuit adopted a method by which evidence of future wages and future interest rates would be presented to the jury even though each factor may contain an inflationary component. The court would not permit evidence of a specific future inflation rate because it was speculative and could tend to confuse the jury. However, by permitting evidence of future wage losses which may contain an inflationary component, the court improperly permitted

consideration of future inflation which may not necessarily be reflected in future wage changes.

In sharp contrast to the foregoing cases, in *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir. 1974), the Sixth Circuit, while holding that future inflation was too speculative to be the subject of expert testimony, nevertheless adopted an approach for considering inflation in future damage awards by permitting jurors to apply their common knowledge of inflation in reaching a verdict. The court noted that an exorbitant verdict could be rectified by remittitur. This approach invites sheer speculation on the part of the jurors and the court impermissibly allows the fact-finder to make judgments not supported by the record. *Compare Liepelt, supra*, at 494 (where this Court indicated its preference for evidence of all elements of damages).

While the foregoing cases can be criticized on the basis that they did not properly distinguish between estimated future wage losses and estimated increases in inflation, the *Pfeifer* case represents a radical departure from any of the foregoing methods and contravenes established judicial norms.

The *Pfeifer* court, on the basis of an inadequate record, *ipse dixit*, ruled "that the rate of future inflation will be equivalent to future interest rates." *Pfeifer, supra*, 678 F.2d at 461. This rule is erroneous and must be rejected by this Court for the following reasons.

First, a number of courts have recognized the existence of a "real rate of interest" which "mirrors the rate of interest that lenders would charge in an inflationless society." *See Culver*, 688 F.2d at 295; *accord, Doca v. Marina Mercante Nicaraguense, S.A., supra*. The existence of a rate of interest independent of the pressures of inflation undergirds the rationale of the inflation adjusted discount rate. *See, e.g., Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (D.Conn. 1974), *rev'd on other grounds*, 524 F.2d 384 (2d Cir. 1975); *Doca, supra*. If the theory which underlies the calculation of an inflation

adjusted discount rate is valid, then the foundation of the *Pfeifer* "total offset" rule is flawed. The Third Circuit, therefore, erred in its assumption that future interest rates will be totally offset by future inflation.

Secondly, the Third Circuit improperly announced a rule of law without the benefit of an adequate record. Those courts which have allowed evidence of inflation to be presented to the fact-finder have at least required that it be admitted upon a proper foundation. *See, e.g., United States v. English*, 521 F.2d 63 (9th Cir. 1975) (holding that the estimate of future inflation must be supported by competent evidence, and that the court may not assume that the discount rate and the inflation rate will net to zero); *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) (allowing expert testimony which included indirect consideration of anticipated future inflation, but suggesting that such testimony could not properly predict future inflation at a specified rate); *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977) (adopting the *English* standard); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982) (allowing evidence of inflation provided that such evidence be applied consistently in choosing the discount rate and in estimating future damages); *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622 (9th Cir. 1982) (ruling that the discount rate is an evidentiary issue, and thus it is the responsibility of the parties to produce evidence of the appropriate rate).

The trial court record in *Pfeifer* is devoid of any evidence whatsoever relating to estimated future inflation or discount rates. The United States Court of Appeals for the Third Circuit had before it the testimony of precisely one witness who could talk dollars and cents: Randy A. Pingree, an employee of Jones & Laughlin, whose title was "Assistant Supervisor of Hourly Payroll". Mr. Pingree was neither an actuary nor an economist — he was a payroll clerk. While this witness was able to present testimony with respect to past cost of living ad-

justments awarded by Jones & Laughlin on a quarterly basis, he was unable to state whether such increases were based upon statistics issued by the Bureau of Labor, the Consumer Price Index, or otherwise. *See* trial transcript at pages 413-424.

What the United States Court of Appeals for the Third Circuit has done with the record of this case is plainly wrong: it has engaged in sophisticated economic fact finding, randomly applying selected economic theories and state common law, to decide a complex question of federal maritime law with economic and jurisprudential ramifications far beyond the geographic bounds of the Third Circuit.

In all of the foregoing cases, the *Kelly* rule requiring a reduction in future earnings to present value has consistently been recognized and applied. However, in *Pfeifer*, the Third Circuit Court of Appeals departed from this doctrine and "borrowed" the law of Pennsylvania as most recently pronounced by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980).[14] The Court below clearly erred in adopting Pennsylvania law to supply the method of computation of damage awards for future loss of wages in maritime personal injury and death cases in disregard of the established federal standards embodied in *Chesapeake & Ohio Ry. Co. v. Kelly, supra*, and recently reaffirmed in *Norfolk & Western Ry. Co. v. Liepelt, supra*.

---

14. While the *Pfeifer* court "bid fealty" to the concept of reducing future earnings to present worth, 678 F.2d at 461, the "total offset method" adopted by the court under the Pennsylvania case of Kaczkowski v. Bolubasz cannot be meaningfully reconciled with *Kelly's* emphasis upon the earning power of money presently received. This analysis is supported by the Seventh Circuit's decision in O'Shea v. Riverway Towing Company, 677 F.2d 1194 (7th Cir. 1982), decided eleven days after *Pfeifer*. In that case, Judge Posner took judicial notice of the so-called "Fisher effect," which predicts that, while the "real" rate of interest remains constant, the nominal rate rises proportionally in response to the pressures of inflation. *See* I. Fisher, *The Theory of Interest*, 43 (1930); R. Posner, *Economic Analysis of Law*, 78-79 (1973).

In *Pfeifer* the court held that "the discount factor is presumed equal to and offset by the impact of inflation on the future economic value of the award." 678 F.2d at 461. Thus, *Pfeifer* effectively removed from the jury's consideration the well-settled principle of discounting future damages to present value. The Third Circuit compounded its error by improperly adopting state law to govern an important issue of federal law in contravention of established Supreme Court law. The *Pfeifer* decision is an ill-advised attempt to "simplify" calculation of damages in federal courts which undermines important principles of uniform federal law clearly stated in the *Kelly* and *Liepelt* decisions.

The *Culver* court observed that the Alaska-cum-*Pfeifer* rule unnecessarily penalizes defendants by its presumption that inflation is equal to the discount rate, thus requiring no expert testimony. 688 F.2d at 299, n. 26. Amici asks the same question of this Court as was raised by the *Culver* court: "How do judges know that much?" *Id.*

Perhaps the most serious error committed by the court below was its failure to recognize the need for national uniformity in the area of maritime personal injury and death cases. *See generally, Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); M/V TUNGUS v. *Skovgard*, 358 U.S. 588, 601-02, 608-11 (1959) (Brennan, J., dissenting); *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215-16 (1917). *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 596, 601 (1974) (Powell, J., dissenting).

In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), this Court rejected a compensation scheme that subjected maritime employers to inconsistent liabilities dependent upon the individual compensation laws of the States. The rationale underlying the *Knickerbocker* decision applies with equal force to the case at bar. The *Pfeifer* personal injury action was filed pursuant to the

1972 amendments to the LHWCA. The framers of those amendments specifically intended that uniform federal law should apply in all actions arising under the Act:

> Finally, the committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the state in which the port may be located. The committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law.

House Report No. 92-1441, reprinted in 1972 U.S.C.C.A.N. 4698 at 4705.

The Third Circuit decision in *Pfeifer v. Jones & Laughlin Steel Corporation* has deepened the conflicts among the U.S. Circuit Courts of Appeal concerning calculation of awards for future wage losses and will subject vessel operators to inconsistent liabilities depending on where in the United States they happen to trade, or if they are amenable to service of process in several judicial districts.

For all of the reasons stated above, Amici respectfully urge this Court to reverse the judgment of the United States Court of Appeals for the Third Circuit.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit in *Pfeifer* is in error because it failed to reduce future loss of earnings to present worth and is in conflict with the decision of this Court in *Kelly, supra*, and is in violation of the FELA and Jones Act in that it awarded plaintiff more than the pecuniary loss prescribed in both statutes. Amici urge at the same time that this Court reverses *Pfeifer* that it lay down a rule prohibiting evidence of inflation. Alternatively, if this Court recognizes that inflation must be taken into account in calculating future losses, then Amici urge the adoption of a rule based upon the national average weekly wage and the discount rate at the time and place of trial.

Respectfully submitted
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APPENDIX TO BRIEF OF AMICI CURIAE

ADDENDUM A

Year	*Wage Increase 5.12% Per Year*	*Present Value Factor at 2%*	*Present Value*
1	10,000.00	.980	9,800.00
2	10,512.00	.961	10,102.03
3	11,050.21	.942	10,409.30
4	11,615.98	.924	10,733.17
5	12,210.72	.906	11,062.91
6	12,835.91	.888	11,398.29
7	13,493.11	.871	11,752.50
8	14,183.96	.853	12,098.92
9	14,910.18	.837	12,479.82
10	15,673.59	.820	12,852.34
11	16,476.07	.804	13,246.76
12	17,319.64	.788	13,647.88
13	18,206.40	.773	14,073.55
14	19,138.57	.758	14,507.04
15	20,118.47	.743	14,948.02
16	21,148.53	.728	15,396.13
17	22,231.34	.714	15,873.18
18	23,369.58	.700	16,358.71
Total	284,494.26		230,740.55

ADDENDUM B

Year	*Wage Increase 3% Per Year*	*Present Value Factor at 2%*	*Present Value*
1	10,000.00	.980	9,800.00
2	10,300.00	.961	9,898.30
3	10,609.00	.942	9,993.68
4	10,927.27	.924	10,096.80
5	11,255.09	.906	10,197.11
6	11,592.74	.888	10,294.35
7	11,940.52	.871	10,400.19
8	12,298.74	.853	10,490.83
9	12,667.70	.837	10,602.86
10	13,047.73	.820	10,699.14
11	13,439.16	.804	10,805.08
12	13,842.33	.788	10,907.76
13	14,257.60	.773	11,021.12
14	14,685.33	.758	11,131.48
15	15,125.89	.743	11,238.54
16	15,579.67	.728	11,342.00
17	16,047.06	.714	11,457.60
18	16,528.47	.700	11,569.93
Total	231,144.30		191,946.77

ADDENDUM C

Year	*Wage Increased 5.12% Per Year*	*Present Value Factor at 2%*	*Present Value*	*Present Value of $10,000 Per Year Discounted at 4.88%*
1	10,000.00	.909	9,090.00	
2	10,512.00	.826	8,682.91	
3	11,050.21	.751	8,298.70	
4	11,615.98	.683	7,933.71	
5	12,210.72	.620	7,570.65	
6	12,835.91	.564	7,239.45	
7	13,493.11	.513	6,921.97	
8	14,183.96	.466	6,609.73	
9	14,910.18	.424	6,321.92	
10	15,673.59	.385	6,034.33	
11	16,476.07	.350	5,766.62	
12	17,319.64	.318	5,507.65	
13	18,206.40	.289	5,261.65	
14	19,138.57	.263	5,033.44	
15	20,118.47	.239	4,808.31	
16	21,148.53	.217	4,589.23	
17	22,231.34	.197	4,379.57	
18	23,369.58	.179	4,183.15	
	$ 284,494.17		$114,232.99	$117,999.59
19	24,566.10	.164	4,028.84	
20	25,823.88	.149	3,847.76	
21	27,146.06	.135	3,664.72	
22	28,535.94	.123	3,509.92	
23	29,996.98	.112	3,359.66	
24	31,532.83	.102	3,216.35	
25	33,147.31	.092	3,049.55	
	$ 485,243.27		$138,909.79	$142,650.28
26	34,844.45	.084	2,926.93	
27	36,628.49	.076	2,783.77	
28	38,503.87	.069	2,656.77	
29	40,475.27	.063	2,549.94	
30	42,547.60	.057	2,425.21	
	$ 678,242.92		$152,252.41	$155,849.87

Year	Wage Increased 5.12% Per Year	Present Value Factor at 2%	Present Value	Present Value of $10,000 Per Year Discounted at 4.88%
31	44,726.04	.052	2,325.75	
32	47,016.01	.047	2,209.75	
33	49,423.23	.043	2,125.20	
34	51,953.70	.039	2,026.19	
35	54,613.73	.036	1,966.09	
36	57,409.95	.032	1,837.12	
37	60,349.34	.029	1,750.13	
38	63,439.23	.027	1,712.86	
39	66,687.32	.024	1,600.50	
40	70,101.71	.022	1,542.24	
41	73,690.92	.020	1,473.82	
42	77,463.90	.018	1,394.35	
43	81,430.05	.017	1,384.31	
44	85,599.27	.015	1,283.99	
45	89,981.95	.014	1,259.75	
46	94,589.03	.012	1,135.07	
47	99,431.99	.011	1,093.75	
	$1,846,150.29		$180,373.28	$183,089.51

MOTION FILED
DEC 17 1982

No. 82-131

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

JONES & LAUGHLIN STEEL CORPORATION,

Petitioner,

v.

HOWARD E. PFEIFER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

1. Whether a longshoreman, who is receiving benefits under the Longshoremen's and Harbor Workers' Compensation Act, is entitled to maintain an action against his employer for negligence under § 905(b) of the LHWCA, when the employer is the owner or owner pro hac vice of the vessel upon which the longshoreman suffered his injuries.

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MOTION OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

The International Longshoremen's and Warehousemen's Union respectfully moves the Court for permission to file the accompanying Brief Amicus Curiae in support of Respondent, limited to a discussion of the first question presented by the brief of Petitioner, i.e.:

> "Whether a longshoreman, who is receiving benefits under the Longshoremen and Harbor Workers' Compensation Act, is entitled to maintain an action against his employer for negligence under Section 905(b) of the LHWCA, when the employer is the owner or owner pro hac vice of the vessel upon which the longshoreman suffered his injuries."

The International Longshoremen's and Warehousemen's Union (ILWU) is a labor organization with headquarters in San Francisco, California, which through its various locals represents approximately ten thousand longshoremen and marine clerks employed in maritime commerce on the waterfronts of California, Oregon,

Washington, Alaska, and Hawaii. In years past, the ILWU has cooperated with employer interests in mechanizing cargo operations on the West Coast waterfront, resulting in a substantial reduction of the work force and increased efficiency in stevedoring operations. Representatives of the ILWU participated in Congressional hearings and agreements which led to the enactment of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Those Amendments increased workmen's compensation benefits for maritime workers and to some extent limited remedies available to maritime workers in third party actions against vessels for personal injuries sustained in maritime employment.

The ILWU is concerned that this Court properly interpret the 1972 Amendments, so as not to restrict third party remedies available to longshoremen and other

harbor workers beyond the point intended by Congress.

Petitioner has refused to give consent to the filing of the accompanying brief of Amicus Curiae. Petitioner's brief, in arguing that a longshoreman should be precluded from maintaining an action against his employer for negligence when the employer is the owner or owner pro hac vice of the vessel upon which the longshoreman suffers injury, omits substantial portions of the legislative history of the 1972 Amendments, which make it clear that Congress intended to preserve the rule of Reed v. The Yaka, 373 U.S. 410 (1963), in a negligence context. The ILWU does not know to what extent Respondent intends to review the legislative history in his brief. The decision of the Court below does not discuss the legislative history.

The ILWU further wishes to discuss

briefly the undesirable consequences which a ruling in Petitioner's favor may have in West Coast ports of the United States. All of these matters are set forth at length in the brief which accompanies this motion.

Respectfully submitted,

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No. 82-131

IN THE SUPREME COURT

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OCTOBER TERM, 1982

JONES & LAUGHLIN STEEL CORPORATION,

Petitioner,

v.

HOWARD E. PFEIFER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The International Longshoremen's and Warehousemen's Union (ILWU) is a labor organization with headquarters in San Francisco, California, which through its various locals represents approximately ten thousand longshoremen and marine clerks employed in maritime commerce on vessels and docks in California, Oregon, Washington, Alaska and Hawaii. Representatives of the ILWU participated in Congressional hearings and agreements which lead to the enactment of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Those Amendments increased workmen's compensation benefits for maritime workers and to some extent limited remedies available to maritime workers in third party actions against vessels for personal injuries sustained in maritime employment.

The ILWU is concerned that this Court

properly interpret the 1972 Amendments to the LHWCA so as not to restrict third party remedies available to longshoremen and other harbor workers beyond the point intended by Congress.

Longshoring is one of the most dangerous occupations in the United States, ranking with mining in the frequency and severity of injuries sustained by employees. In enacting the 1972 Amendments to the LHWCA, Congress preserved a negligence remedy. The Committee Reports accompanying the legislation recognize that "[p]ermitting actions against the vessel based on negligence will meet the objective of encouraging safety* * *." Report of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Report No. 92-1125, page 10; Report of the House Committee on Education and Labor, 92d Cong., 2d Sess., Report No. 92-1441, page 6. Petitioner seeks to bar long-

shoremen who are receiving benefits under the LHWCA from maintaining an action against the employer when the employer is the owner or owner pro hac vice of the vessel upon which the longshoreman suffered his injuries. This effort is contrary to Congressional intent as expressed both in the 1972 Amendments and accompanying Senate and House Committee Reports.

The ILWU appears as Amicus Curiae in this proceeding as a spokesman for the many thousands of waterfront employees which it represents through its local unions in West Coast ports. The ILWU is obligated to protect the working conditions and legal rights of its members whenever, as in the present case, those working conditions and rights have been subjected to challenge.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Sections 905(a) and (b) of the Longshoremen's and Harbor Workers' Compensation Act, reproduced below.

> "(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the

risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

SUMMARY OF ARGUMENT

The legislative history of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (S. 2318, Public Law 92-576) makes it clear that Congress, in enacting the 1972 Amendments to the LHWCA, intended to preserve the rule of Reed v. The Yaka, 373 U.S. 410 (1963) in a negligence context. The Report of the Senate Committee on Labor and Public Welfare which accompanied the Amendments referred specifically to Reed v. S.S. Yaka, 373 U.S. 410 (1963) and stated: "[T]he rights of an injured longshoreman or shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the Bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence

of persons engaged in performing longshoring services. Similar provisions are applicable to shipbuilding or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or shipbuilders or repairmen as apply when an independent contractor employs such persons." Report of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Report No. 92-1125, pages 11, 12. The Report on the House Committee on Education and Labor contains virtually identical language. Report of the House Committee on Education and Labor, 92d Cong., 2d Sess., Report No. 92-1441, pages 7, 8.

Section 905(b), as enacted, embodies the intent of the Committee Reports. If the person injured is employed by the

vessel to provide stevedoring services, (i.e., a longshoreman), he is barred from a negligence action only "if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." If the person injured was a shipbuilder or repairman, he is barred only if "the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel."

All federal appellate courts which have considered the issue agree that the 1972 Amendments preserve Reed v. The Yaka. Indeed, this Court has expressly recognized, in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266 (1979), that this was the Congressional purpose.

Failure to give effect to Congressional intent would be likely to involve the federal courts in unravelling a variety of schemes devised to defeat negligence act-

ions permitted by Section 905(b). American flag lines can easily enter into arrangements to do their own stevedoring. Indeed, several such lines have in years past hired their own stevedore employees. Foreign flag vessels may well obligate stevedores to become "demise charterers" of their vessels while being loaded or discharged in the United States. Efforts of this kind have already been attempted in West Coast ports.

ARGUMENT

1. The 1972 Amendments to the Longshoremen's and Harbor Workers' Act, as embodied in 33 USC 905(b), were intended to preserve the rule of Reed v. The Yaka in a negligence context.

Petitioner characterizes Respondent Howard Pfeifer as a "longshoreman." Amicus curiae will accept that characterization, although Mr. Pfeifer's employment as a coal barge "landing helper" appears to be of that nebulous character which would with equal facility permit him to be categorized as a Jones Act seaman or harbor worker.

Prior to the effective date of the 1972 Amendments to the Longshoremen's and Harbor Workers' Act, 33 U.S.C § 901 et seq, a longshoreman had a right to bring an action against his own employer, in spite of the exclusive remedy provisions of the LHWCA, for violation of the

warranty of seaworthiness. That right was established in Reed v. The Yaka, 373 U.S. 410 (1963). While Reed was an in rem proceeding, the cause of action against the employer was quickly converted into an in personam remedy. Jackson v. Lykes Bros. Steamship Co., Inc., 386 U.S. 731 (1967).

In 1972, Congress amended the LHWCA to increase workmen's compensation benefits and eliminate the warranty of seaworthiness. The Amendments preserved a remedy against vessel owners and operators based upon negligence. Congress specifically addressed the rule of Reed v. The Yaka in the Amendments and accompanying Committee Reports. Petitioner has failed to cite to this Court the applicable portions of the reports of the Senate Committee on Labor and Public Welfare and House Committe on Education and Labor which make it clear that Con-

gress intended to preserve the rule of Reed v. The Yaka in actions based upon negligence.

Senator Eagleton, a co-sponsor of the Amendments, submitted a "do pass" Report of the Senate Committee on Labor and Public Welfare accompanying the Bill. The Report, No. 92-1125, 92d Cong., 2d Sess., states (at page 11):

> "The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or shipbuilder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in Reed v. S. S. Yaka, 373 U.S. 410 (1963) and Jackson Lykes Bros. Steamship Co., 386 U.S. 731 (1967), held that the unseaworthiness remedy is available to the injured longshoreman. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or an independent contractor. Accordingly, the Bill provides in the case of a longshoreman who is employed directly by the vessel there will

be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons."

In a section-by-section analysis, the Report continued as follows (page 25):

"If the employee was employed by the vessel to provide stevedoring services and his injury was caused by the negligence of other persons providing stevedoring services to the vessel, action against the vessel would be barred. Similarly, if the employee were employed by the vessel to provide shipbuilding or repair services and his injury were cause by the negligence of other persons providing such services to the vessel, such an action would be barred. Actions under this section cannot be based on the doctrine of seaworthiness and actions provided for in this section would be the exclusive remedy against a vessel. Vessel would be defined as any vessel upon which or in connec-

> tion with which any person entitled to benefits suffers injury and including the vessel owner and others responsible for the operation of the vessel."

The Report of the House Committee on Education and Labor, No. 92-1441, 92d Cong., 2d Sess., is a carbon copy of the Senate report and contains identical language, both as to general principles (pages 7, 8), and section-by-section analysis. (page 22). The House Report refers to Reed v. The Yaka and Jackson v. Lykes Bros. Steamship Co., and states: "The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairman as apply when an independent contractor employs such persons." House Report, page 8.

The 1972 Amendments, as embodied in 33 U.S.C § 905(b), reflect the intent of Congress. Section 905(b) provides that in

the event of injury to a covered employee "caused by the negligence of a vessel", the employee "may bring an action against such vessel as a third party." The only limitation is as follows:

> "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel."

The term "vessel" is defined by 33 U.S.C § 902(21) as:

> "any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charterer, or bare boat charterer, master, officer, or crew member."

Thus, whatever might be the continued vitality of Reed v. The Yaka if considered apart from legislation, it is apparent that Congress has taken action to codify that decision in the 1972 Amendments. Recognizing that the relationship of employee, stevedore and vessel owner is normally tripartite, Congress has determined that rules governing the three-way relationship will apply even when the functions of stevedore and shipowner are combined in the same employer.

The Court has already recognized that this was the Congressional intent in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266 (1979), where the Court stated:

> "[I]t is necessary only to construe the second sentence [i.e., of 33 U.S.C § 905(b)] to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury. The second sen-

> tence means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself."

2. All decisions of all federal appellate courts which have considered the question hold that the 1972 Amendments were intended to extend the rule of Reed v. The Yaka to harborworkers' actions based upon negligence.

Without exception, every Court of Appeals to have considered the question holds that the rule of Reed v. The Yaka, in a negligence context, has survived the 1972 Amendments and is applicable both to longshoremen and other harbor workers. Fanetti v. Hellenic Lines, Ltd., 678 F2d 424 (CA 2, 1982); Napoli v. Transpacific Carriers Corp., 536 F2d 505 (CA 2, 1976); Smith v. Eastern Seaboard Pile Driving Inc.,

604 F2d 789 (CA 2, 1979); Griffith v. Wheeling-Pittsburgh Steel Corp., 521 F2d 31 (CA 3, 1975); Richardson v. Norfolk Ship Building & Dry Dock Corp., 621 F2d 633 (CA 4, 1980); Chiasson v. Rogers Terminal & Shipping Corp., 679 F2d 410 (CA 5, 1982); Smith v. M/V Captain Fred, 546 F2d 119 (CA 5, 1977); Robertson v. Jeffboat, 651 F2d 434 (CA 6, 1981).

The only appellate court decisions which have held that a harbor worker may not bring an action against his employer for negligence, as contrasted with unseaworthiness, in the employer's capacity as a vessel owner or operator involved injuries arising before the enactment of the 1972 Amendments to the LHWCA. See Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 545 F2d 235 (CA 1, 1976); Arvidson v. Dilling-

ham Corp., 462 F2d 1 (CA 9, 1972).[1] However, as all of the post-1972 Amendment cases cited above recognize, the Amendments were intended to extend the rule of Reed v. Yaka to negligence actions.

3. Failure to follow Congressional intent would encourage vessel owners to try to defeat Section 905(b) negligence actions by spurious contractual arrangements or other subterfuge.

Most of the shipping in West Coast ports of the United States is carried on by vessels of foreign registry which are compelled to use American stevedores. However, there are still a few American flag lines operat-

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[1] In Buna v. Pacific Far East Lines, Inc., 441 F Supp 1360 (N.D. Calif., 1977) and Baker v. Pacific Far East Lines, 451 F Supp 84 (N.D., Calif., 1978), the Northern District of California declined to follow Reed v. Yaka. These decisions have not been followed elsewhere. See Harter v. Columbia Marine Lines, --- F Supp --- (D.Or., 1982, No. 81-728).

ing on the West Coast, and in years past, although not presently, these lines, American Mail Line, Ltd., (now American President Lines), and Lykes Bros. Steamship Co., have at various times and places contracted to do their own stevedoring. Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731 (1967); American Mail Line, Ltd. v. Weaver, 408 F2d 674 (CA 9, 1969). A third west coast vessel operator, Matson Navigation Company, has employed longshoremen through a subsidiary, Matson Terminals Company. Huff v. Matson Navigation Co., 338 F2d 205 (CA 9, 1964). See also, Kanton v. Grace Line, Inc., 234 F Supp 409 (W.D. Wash., 1964), which indicates that a line no longer in business on the West Coast used the same arrangement. In the event that the rule of Reed v. The Yaka, were overturned, these and other American flag lines would be offered a reason to create corporate structures designed to

eliminate Section 905(b) negligence actions.

Furthermore, foreign steamship lines would be tempted to seek the same immunity by subterfuge. The most obvious technique is to compel a stevedore to contract to perform services traditionally performed by the vessel; that is, to make the stevedore, in practical effect if not in name, a "demise" or "bareboat" charterer of the vessel while the vessel is in port.[2] Contracts of that nature have been attempted. For example, in Meuler v. American President Lines, Ltd., (CA 9, No. 80318, unreported memorandum, January 18, 1982), the Ninth Circuit

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[2] "In this form, the charterer takes over the ship, lock, and barrel, and mans her with his own people. He becomes, in effect, the owner pro hac vice, just as does the lessee of a house and lot, to whom the demise charterer is analogous." Gilmore and Black, The Law of Admiralty (2d ed.) p. 194. See also, Reed v. S.S. Yaka, 373 U.S. 410, 412 (1963).

disposed of such an agreement in the following language:

> "It was not error to hold that the contract with the stevedore was inadmissable to prove that the stevedore had assumed responsibility for the condition of the ship. Under § 905 (b) a shipowner cannot by contract with a stevedore relieve itself of liability for its own acts of negligence."

To date, federal appellate courts have been unwilling to permit vessel owners to escape liability in Section 905(b) negligence actions by contractual delegation of the responsibility for safety. Lopez v. A/S D/S Svendborg, 581 F2d 319, 329 (CA 2, 1978). However, it is foreseeable that failure to follow the Congressional policy of preserving Reed v. The Yaka would be productive of voluminous litigation to determine the bona fides or mala fides of shipowner efforts to defeat negligence claims by altering the apparent status of employment relationships.

CONCLUSION

The Court should hold, pursuant to the intent of Congress in enacting the 1972 Amendments to the LHWCA, that a longshoreman or other harbor worker is entitled to maintain an action against his employer for negligence under Section 905(b) of the LHWCA, when the employer is the owner or owner *pro hac vice* of the vessel upon which injury occurs.

Respectfully submitted,

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MOTION FILED
NOV 18 1982

No. 82-131

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JONES & LAUGHLIN STEEL CORPORATION
owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,
Petitioner

v.

HOWARD E. PFEIFER,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION ON BEHALF OF THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

1. The proposed Amicus Curiae is the Southeastern Pennsylvania Transportation Authority (hereinafter referred to as "SEPTA"). SEPTA is a Metropolitan Transportation Authority organized under Article III of the Pennsylvania Urban Mass Transportation Law, 55 P.S. §600.301 *et seq.* SEPTA is an agency and instrumentality of the Commonwealth of Pennsylvania. It has as its legislative purpose the coordination of mass transit and commuter rail transportation in the Metropolitan Philadelphia area, which includes Philadelphia and the surrounding Counties of Bucks, Chester, Delaware, and Montgomery. The SEPTA Board, which oversees the operation of the Authority, is composed of members appointed by the Governor of Pennsylvania and by the Governments of each of the Counties and the City of Philadelphia. A Chief Operations Officer/General Manager is appointed by the Board to oversee the day-to-day operations of the Authority. SEPTA's General Counsel is the chief legal officer of the Authority.

2. At the present time, SEPTA has directly assumed some of the commuter rail operations which it had formerly assigned to Conrail as its independent contractor. Regional Railroad Reorganization Act of 1973, as amended, 45 U.S.C. §701. Beginning January 1, 1983, SEPTA will assume the remainder of those operations under the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. E, 95 Stat. 357, 643 (NRSA). Currently, SEPTA is now responsible for the handling of claims for personal injuries sustained by its railroad employees under the Federal Employers' Liability Act. 45 U.S.C. §51 *et seq.* Under the Northeast Rail Service Act of 1981, SEPTA may continue to be responsible for those job related injuries. The interest of the Amicus SEPTA in this case arises from its potential liability under the above-named federal statutes. That interest may not be

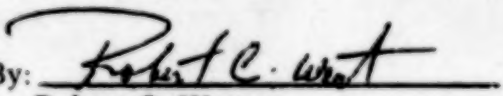
completely represented before this Court due to the limited involvement of the Petitioner and Respondent in those transportation activities which fall under the Federal Employers' Liability Act. By reason of its familiarity with the Federal Employers' Liability Act, as well as its experience in grappling with the problems generated by the case of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), the proposed Amicus is in a unique position to present to the Court a thorough exposition of the far reaching effects of the errors contained in the Third Circuit Court of Appeals decision in *Pfeifer v. Jones and Laughlin Steel Corp.*, 678 F.2d 453 (3rd Cir. 1982), relative to the introduction of evidence of future inflation.

3. The proposed Amicus will take the position that the method of evaluating inflation as proposed in *Kaczkowski, supra*, i.e., the "total offset" or so-called "Alaskan Rule", is based upon an economic fallacy and does not reflect economic reality. The proposed Amicus will not address itself to the first question presented to the Court.

4. Counsel for the Respondent has refused permission to SEPTA to file an amicus brief in this case. SEPTA, under the authority granted to it by the General Assembly of Pennsylvania, exercises the public powers of the Commonwealth as an agency and instrumentality of the state. 55 P.S. §600.303. As such, SEPTA believes that under Rule 36.4 of the Rules of the Supreme Court it need not have permission to file an amicus brief. SEPTA's request for permission to file an amicus brief, and this instant motion, are presented as a precaution in the event that its interpretation of Rule 36.4 is incorrect.

WHEREFORE, SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY respectfully requests leave of this Court to file the attached brief as an Amicus Curiae.

Respectfully submitted,

By: 

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IN THE

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JONES & LAUGHLIN STEEL CORPORATION
owner or owner pro hac vice of Barges 1011, 1384, 1400, 1363, and others in a fleet,
Petitioner

v.

HOWARD E. PFEIFER,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF AMICUS CURIAE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Did the lower court err in ruling that the plaintiff had a valid cause of action against his employer under Section 905 (b) of the Longshoremen's and Harbor Workers' Compensation Act?

II. Did the lower court err in applying the law of the Commonwealth of Pennsylvania, specifically the case of *Kaczkowski v. Bolubascz*, 491 Pa. 561, 421 A.2d 1027, (Pa. 1980), to a case filed under a federal statute in determining the proper measure of damages?

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INTEREST OF AMICUS

The Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") is a Metropolitan Transportation Authority organized under Article III of the Pennsylvania Urban Mass Transportation Law, 55 P.S. §600.301 *et seq.* The Authority exercises the public powers of the Commonwealth as an agency and instrumentality thereof. 55 P.S. §600.303. It is the responsibility of SEPTA to coordinate passenger and commuter transportation in the Metropolitan Philadelphia area, including Philadelphia and its four surrounding Counties. As part of its function SEPTA has already assumed a part of the commuter operations formerly handled by Conrail as its independent contractor and, on January 1, 1983, it will assume responsibility for those operations in their entirety.

The SEPTA Board, which oversees the operation of the Authority, consists of members appointed by the Governor of Pennsylvania and by the Governments of the City of Philadelphia and the four other Counties. The Authority derives its revenue from fare collections, and from subsidies from the Commonwealth and the Counties and from federal grants.

SEPTA is vitally interested in Question Two of the instant case. Its case load and exposure under a federal statute, the Federal Employers' Liability Act, (hereinafter "FELA"), 45 U.S.C. §51 *et seq.*, may grow considerably under the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. E, 95 Stat. 357, 643 (NRSA), as it assumes the functions previously performed by Conrail beginning in January, 1983. It is important, therefore, that any decision handed down by the Supreme Court relating to the measurement of damages in personal injuries cases under a federal statute be made only after a thorough exposition of the economic issues involved.

SEPTA at the present time has over three thousand active cases. Many of these cases involve the application

of *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), and the Amicus is in a very strong position to demonstrate the weakness of the total offset method of handling evidence on inflation which was adopted by the Pennsylvania Supreme Court in *Kaczkowski, supra*, and applied by the Third Circuit in the instant case. If the opinion of the Third Circuit is allowed to stand, and the total offset method applied to cases brought under a federal statute, SEPTA's exposure for such damage claims will increase by millions of dollars in future years.

It is the position of the Authority that the opinion of the Third Circuit sustaining the lower court's opinion in the instant case and adopting the total offset method should be overruled and the case remanded. Counsel for the Respondent has refused to allow us to file an amicus brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit erred in applying the total offset method, adopted by the Pennsylvania Supreme Court in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), to the case of *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3rd Cir. 1982), a personal injury action brought under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b). The Court refused to reduce the verdict to present worth as required by the decision of the Supreme Court in *Chesapeake and Ohio Railway Co. v. Kelly*, 241 U.S. 485 (1916). Furthermore, the Court's adoption of the total offset method is based upon an economic fallacy — that future inflation will equal the discount rate. In fact, interest rates are generally several points higher that the inflationary rate and it is this difference which forms the basis for the discount rate which is used to reduce a verdict to present worth.

A number of often conflicting methods have been adopted by the Circuits to handle evidence of future inflation. However, if a federal statute is involved it is necessary that the method applied for the measurement of damages in personal injury actions be uniform throughout the nation so that varying results, depended upon the standard of measurement used, can be avoided. Such variations are unfair to all parties.

Long range inflation, per se, is too mercurial and volatile to lend itself to the predictive abilities of an economist. However, if such testimony is to be used it should be confined to the particular plaintiff working in a particular job in a particular industry and in a particular locale. Generalized discussions and predictions of future inflationary rates for the economy as a whole should not be permitted. Any decision by a jury must be based upon reliable and relevant economic evidence confined to the particular plaintiff involved.

ARGUMENT

I. Uniformity Requires That a Single Method of Measurement of Damages Be Applied in Each of the Respective United States Courts of Appeals When a Claimant Seeks Damages for Personal Injuries Under a Federal Statute.

The various circuits are in disagreement as to the treatment to be given to future inflation as an element in a damage award in a personal injury suit brought under a federal statute. The issue of inflation in personal injury suits has become controversial only in the past decade when the Sixth Circuit in *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117 (6th Cir.1974), ruled that a jury, without the benefit of expert testimony, might consider the probability of inflation in a damage award. The Court said that such a factor would fall within the common experience of the jury. Later, the Second Circuit in the case of *Feldman v. Allegheny Airlines*, 524 F.2d 384 (2d Cir.1975), allowed the concept of an inflation factor to be introduced by expert testimony in estimating a loss of future earnings. Each of the Circuits at the present time, with the exception of the First Circuit which still does not allow evidence on inflation, *Williams v. United States*, 435 F.2d 804 (1st Cir.1970), and the Fourth and District of Columbia Circuits, which have not issued an appellate decision on the issue, have established some guidelines for the consideration of inflation as evidence by the fact finder.

It is possible to break down the various methods adopted by the different circuits into five categories. The first is the theory adopted by the Second Circuit in *Feldman, supra*. In an opinion written by District Judge Lasker, the Second Circuit adopted as its rule a very lengthy lower court opinion by Judge Blumenfeld and held that a rate of discount of 1.5% was proper in reducing a verdict to present value since that rate was obtained by adjusting interest rates on "low risk" investments so as to exclude that additional interest which

might be demanded by the financial market as a hedge against the risk of inflation. Judge Blumenfeld pointed out that contemporary investors have added a substantial premium, in addition to payments for the use of their capital, as compensation for the substantial risk that when they receive back the money they have lent, that money will be worth significantly less in terms of real purchasing power. Expectations of inflation, according to Judge Blumenfeld, have driven up present interest rates to dizzying heights, even on usually safe obligations. The Judge proceeded to factor inflation out of the low risk yield and developed what he termed an inflation-free, as well as a risk-free, discount rate to be applied to the monetary value of the claimant's loss of earnings capacity to reduce it to present value. This exercise produced an inflation-adjusted discount rate of 1.5%. More recently in *Doca v. Marina Mercante Nicaraguense S.A.*, 634 F.2d 30 (2d Cir.1980), Judge Newman said that inflation should be considered by estimating the present value of lost wages, and that while the Court would not require a particular adjusted inflation rate when considering inflation, it suggested that a 2% discount rate would be fair to both sides and would be used to reduce a verdict to present value.

The Seventh Circuit in the case of *O'Shea v. Riverway Towing Company*, 677 F.2d 1194 (7th Cir.1982), aligned itself with the Second Circuit's decision in *Doca, supra*. However, it also ruled that before a verdict could be reduced to present worth, the real or inflation-free interest rate must be ascertained.

The Sixth and the Eighth Circuits have taken a position somewhat contrary to that of the Second Circuit. In *Bach, supra*, an FELA case, the Sixth Circuit questioned the ability of an economist to project inflation over a thirty year period and ruled that such testimony was inadmissible as being too speculative. Yet it held that a jury could consider the probability of inflation and that inflation was a fact of life within the common experience

of the jury. It accepted a definition of inflation as "future increases or decreases in the purchasing power of money", *Id.*, 502 F.2d at 1122. If, however, the trial judge should find that the jury overstepped its bounds, he could use the power of a remittitur to keep any such excess jury verdict within reasonable limits and insure that the verdict conformed to the evidence. A later case, *Morvant vs. Construction Aggregates Corp.*, 570 F.2d 626 (6th Cir.1978), put the decision in *Bach, supra*, into some doubt by allowing into evidence expert testimony at least as to an individual's projected productivity and the possible effect of inflation within a particular trade.

The Eighth Circuit in *Riha v. Jasper Blackburn Corp.*, 516 F. 2d 840 (8th Cir. 1979), applied Nebraska law and ruled that expert testimony on a projected rate of inflation and its effect on a permanently disabled plaintiff's future earning capacity was inadmissible. Like the Sixth Circuit in *Bach, supra*, the Court ruled that it was error for the District Court to charge the jury that it should not consider future increases or decreases in the purchasing power of money. The Court ruled that inflation is a fact of life and that while the jurors' calculations might be imprecise, there was still the power of a remittitur.

In a later FELA case, *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979), the Eighth Circuit allowed expert testimony on wage increases which the claimant might have obtained in the future. However, the Court limited such testimony only to future pay increases within the particular job classification of the plaintiff. The Court held, however, that, in FELA cases, it is an abuse of discretion for the trial court to admit expert testimony predicting a specified rate of future inflation for the country as whole. The Court believed that such a rate was so speculative and uncertain that it would open up a whole series of collateral issues which would make the trial unmanageable. Such a prediction of future inflation rates, according to the Court, would

require an exploration of an expert's view on the validity of a number of economic theories which would only waste time and confuse the fact finder. However, expert testimony on future wage increases limited to the particular job category or industry involved would not be as likely to so confuse the jury. The Court also ruled that the jury was required to discount the award for future earning capacity to its present value.

The Ninth Circuit in *United States v. English*, 521 F.2d 63 (9th Cir. 1975), held that the jury must take into account an estimate of changes in the future purchasing power of money in arriving at a damage award. The Court felt that to ignore the fact of future inflationary trends would be inconsistent with economic realities. It went on to say that, as with any other element of damages, competent evidence must be offered so that an estimate of any future inflation can be supported by sound economic evidence. The Court acknowledged problems in the prediction of future economic conditions. However, it felt that by allowing the trier of fact to take into account only those estimates of future changes in the purchasing power of money which are based on sound and substantial economic evidence, a calculation might be made by the jury with some reliability. Furthermore, it held that the Trial Court erred when it failed to discount the deceased's future earnings to present value.

The Tenth Circuit in the case of *Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977), adopted the Ninth Circuit's analysis in the *English* case. The Court rejected the "total offset" method outlined in *Beaulieu v. Elliott*, 434 P. 2d 665 (Alaska 1967). It did, however, rule that the award had to be reduced to present value after the trier of fact had taken into account estimated changes in the purchasing power of money. The Tenth Circuit felt this approach, as opposed to the total offset rule, comes to grips with inflationary trends and with the problem of discounting the verdict to present worth

based upon reliable economic evidence which allows the trier of fact to arrive at a reasonably accurate verdict.

The Fifth Circuit Court of Appeals, until September 1982, was the strongest holdout against the introduction of any evidence of inflation. In *Culver v. Slater*, 688 F.2d 280 (5th Cir. 1982) (en banc), the Court reversed its decision reported at 644 F.2d 460 (5th Cir. 1980) and overruled its earlier opinion in *Johnson v. Pennrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc). The Culver Court ruled that where a federal statute is involved, expert testimony will be accepted on income increases due to inflation. Economic and labor data will be admissible and the defendant must produce data which will rebut the plaintiff's evidence. If an inflation-adjusted discount rate approach is used, the jury must consider and determine all future income losses on the basis of the claimant's present income and any likely increases which might be due to merit or productivity, but which are not due to inflation. The jury must also consider any likely increases in an acceptable inflation indicator and the rate of interest available on some safe investment. Furthermore, this evidence must be confined to the particular individual, industry and locality. Such evidence would give the jury an inflation-adjusted discount rate which would be applied to reduce the verdict to present worth. The Fifth Circuit criticized the method adopted by the Second Circuit and the total offset method approved in *Kaczkowski, supra.*

In the instant FELA case the Third Circuit applied *Kaczkowski, supra*, which had adopted what has been called the Alaskan Rule. This rule was enunicated by the Supreme Court of Alaska in *Beaulieu, supra.* According to its theory, the trier of fact first calculates the loss of earnings capacity over the plaintiff's work life expectancy. In order to account for the inflationary impact on lost future earnings and the effect of future interest rates on any lump-sum payment, a "total offset" method is then applied. Under this method, the Court does not

discount the award to its present value, but assumes that the effect of the future inflation rate will be equal to and, therefore, offset the interest rate, thereby eliminating the need to discount the award to its present value. The Third Circuit is the only Circuit Court to rule that, in a case involving a federal statute, an award must be not reduced to present value.

The application of the total offset method, which does not reduce the damage award to present valaue, is in conflict with the opinion of this Court in *Chesapeake and Ohio Railway Company v. Kelly*, 241 U.S. 485 (1916). That case was a wrongful death action under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* In *Chesapeake*, the Court held that where future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled to no more than the present value, and that since the standard for the proper measure of damages is inseparably connected with the right of action, in cases arising under the Federal Employers' Liability Act, it must be settled according to principles of federal law. In a recent case, *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980), Justice Stevens wrote that even though an action under the FELA statute is brought in state court, questions concerning the measure of damages are federal in character. It is submitted that the measurement of damages in any case brought under a federal statute should be uniform throughout all the Circuits. It is unfair to allow a claimant injured in a jurisdiction of the Third Circuit to recover a larger award than another, perhaps similarly injured individual, in another Circuit.

It can easily be concluded that confusion now reigns in the various Circuits over the proper method of calculating the impact of inflation, or lack thereof, on future earnings. This should be corrected by a pronouncement of this Court as to the standard to be applied in considering inflation in claims for personal injuries un-

der a federal statute and by a clear ruling that verdicts must be reduced to present value.

The conclusion of the Third Circuit in the instant case, that the total offset method satisfies the continued requirement of reduction to present worth as mandated in *Chesapeake, supra*, is simply not true, as will be demonstrated in Section Two. Therefore, since the Third Circuit has applied a standard of damages expressly condemned by the Supreme Court, its affirmance of the opinion of the lower court must be overruled and the case remanded.

II. The Adoption by the Third Circuit of the Total Offset Method Which Does Not Require Reducing a Verdict To Its Present Worth Is Based Upon an Economic Misconception and Is at Variance with the Decision of The Supreme Court in Chesapeake, Supra.

The Alaskan Rule assumes that the rate of inflation will equal the rate of interest and, hence, will equal the discount rate so that the one would cancel out the other and a jury's only mathematical computation is to calculate the plaintiff's projected loss of earnings through his or her projected life expectancy without regard to inflation. However, in economic reality the rate of inflation is clearly distinct from the interest rate over any period of time. The discussion below, centering upon Table 1, clearly demonstrates the basic economic reality which is completely ignored by the total offset method.

The discount rate is the rate which must be determined for the purpose of reducing a verdict to its present value. In the Commonwealth of Pennsylvania, until *Kaczkowski, supra*, the discount rate had been fixed at a 6% simple rate of interest. A discount rate is intended to reflect the probable rate of necessary return on a conservative low risk investment, in order that the discounted total amount of loss suffered through the de-

struction of one's earning capacity will, if invested in such conservative investments, earn enough interest so that the total amount of damages and accumulated interest will be equal to what the decedent would have earned had he or she had the opportunity to continue working. The determination of this rate of discount in most jurisdictions usually requires an economic expert qualified to discuss the current rates of such low risk investments which are readily available and which do not require a specialized knowledge of the financial market for an investment decision.

A review of basic data supplied from the soundest statistical sources demonstrates that rates of interest and of inflation are not equal for any span of years.[1]

Table 1 shows that the average annual rate of interest in any of several types of low-risk investments available to the average investor (with a lump sum award) is distinctly unequal to the average annual rate of inflation over similar periods. The rate of inflation is reflected most clearly in the Consumer Price Index. It is also observable that inflation is evident in increases in private non-agricultural wages. Because of the decline of overall productivity in the most recent era, it is reasonably accurate to infer that most of the non-agricultural wages have increased in response to inflation.

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1. The data appearing on Table 1 are drawn directly from the following government publications:

(a) *Historical Statistics of the United States, Colonial Times to the Present*. U.S. Dep't of Commerce; Bicentennial Edition.

(b) *Economic Report of the President*. U.S. Government Printing Office; 1980, 1981, 1982.

(c) *Statistical Abstract of the United States*. Department of Commerce; 1981.

(d) *Federal Reserve Bulletins*. Board of Governors of the Federal Reserve; 1981, 1982.

TABLE 1

INTEREST RATE AND INFLATION RATE DATA[1]

	PERIOD 1931-1980	PERIOD 1947-1980	PERIOD 1970-1980
9%—			8.57% C3AB
			8.28% PN-AW
			8.17% T-Bills (3 mos.)
8%—			8.00% CPI [1970-1981]
			7.38% USGL-78
7%—			6.23% MHGB
6%—		5.62% PRIVATE NON-AGRIC. WAGE CHANGES [PN-AW][2]	
		5.45% C3AB	
			5.15% SAIR [1970-1982]
5%—			
	4.78% Corporate Triple-A Bonds [C3AB]	4.72% USGL-TB	
		4.46% T-Bills (3 mos.)[2]	
		4.25% CPI [1947-1982]	
		4.15% MHGB	
	4.06% U.S. Gov't Long-Term Bonds [USGL-TB]		
4%—			
		3.86% SAIR [1947-1981]	
	3.76% Municipal High Grade Bonds [MHGB]		
	3.75% CONSUMER PRICE INDEX [CPI]		
	3.51% Savings Acc'ts Interest Rates [SAIR]		
3%—			
2%—		2.07% PRODUCTIVITY[3] [1948-1980][2]	
			1.18% PRODUCTIVITY [1970-1979]
1%—			

Notes

1. With reference to the Footnote in the text indicating the sources for this Table, the eight types of averages appearing in this Table are drawn from those sources, (a) through (d), as follows:

Corporate Triple-A Bonds:	(a), (b) and (c)
U.S. Gov't Long Term Bonds:	(a) and (c)
Municipal High Grade Bonds:	(a), (b) and (c)
CONSUMER PRICE INDEX:	(b) and (c)
Savings Acc't Interest Rates:	(d)
PRIVATE NON-AGRIC. WAGE CHANGES:	(b)
U.S. Treasury Bills, 3 months:	(a) and (c)
Productivity:	(b), (b), (c) and (d)

2. Data not available for first period (1931-1980).
3. Productivity, all workers.

Five of the most attractive yet conservative risk-free types of investment instruments are traced in Table 1: United States Government Long-term Bonds; Three Month U.S. Treasury Bills; Municipal High Grade Bonds; Savings Accounts; and Triple-A Corporate Bonds. Each type of instrument in any given period produces a different rate of interest. Moreover, the differences in percentage points between any two of them changes from one period to another, and the difference between any one of them and the Consumer Price Index changes from one period to another.

More importantly, the Consumer Price index is never the same as the interest rate of any one of the investment instruments. These statistics clearly demonstrate that the underlying premise in the *Kaczkowski* case is not based upon economic and historical reality but is in fact grounded upon a serious misconception of current and past economic conditions.

The idea of associating (but not equating) interest and inflation was developed in Fisher, *The Theory of Interest* (1930). Mr. Fisher noted that, when inflation increases, an enticing premium is added to the real interest rate resulting in a net rate of interest intended to maintain the real value of the principal and interest payments. That is, the loan is repaid at the inflationary dollar rate sc that the borrower is still owing the real as opposed to the inflation rate to the lender. In 1974, Judge Blumenfeld in *Feldman, supra,* went through a painstaking analysis to discover what this inflation-adjusted or inflation-free rate of return would be. He determined that a rate of 1.5% was proper. What that rate would be at the present time should be an issue for the trier of fact which is developed through sound and reliable economic evidence applied to guidelines established by this Court. However, that particular discount rate must be applied according to *Chesapeake, supra,* to the verdict in order to reduce it to present value. Judge Blumenfeld's analysis and conclusion are in complete

disagreement with the theory behind the total offset method. Similarly, the Second Circuit in *Doca, supra,* noted that the inflation rate did not cancel out the discount rate, and that the real rate of interest varied between 1.5% and 3%, which real rate would become the applicable discount rate.

The Alaskan Rule is supported by the argument that it simplifies the procedure to be utilized by a jury in arriving at its verdict. However, this economically unjustified simplification imposes a very substantial and unfair financial burden on a defendant. Let us assume that a deceased plaintiff had a life expectancy of 30 years and was making $10,000 a year at the time of the accident. Under the Alaskan Rule, you simply multiply thirty by ten thousand and come out with a verdict of $300,000. This would not be reduced to present value by any discount rate. If, however, contrary to the Alaskan Rule, a real rate of interest were used as a discount rate, the verdict would require a substantial reduction of the $300,000 to present value. A real rate of interest of only 1% would reduce that verdict by over $40,000 and a real rate of interest of 2% would reduce the verdict by over $70,000. For an entity in the position of SEPTA, which might have a number of these cases in any particular fiscal year, the difference between the application of the total offset method and the use of a discount rate to reduce the verdict to present value would rise into millions of dollars.

Because the method adopted by the Third Circuit in the instant case is inconsistent with current economic theory and since it consistently overcompensates the plaintiff at the expense of the defendant, a result never intended by Congress, this Court should rule that error was committed in using the Alaskan Rule as adopted by *Kaczkowski, supra.*

Judge Brown in the recent decision of *Culver, supra,* at page 299 said:

However, we are less than satisfied with the so-called Alaskan Rule, which by assuming that the discount rate and the inflation rate are virtually identical, unnecessarily penalizes defendants because, as noted above in our discussion of the real rate of interest, interest rates on relatively safe investments will typically ride several percentage points above the rate of inflation. In addition, tied as it is to changes in the Consumer Price Index (CPI), the result would unfairly award the plaintiff the difference between the changes in the CPI and the actual or average increase in wages.

. . . In the dynamic and ever-changing world of finance and economics, we as judges cannot rule out that the interest rate on risk-free investments might equal the inflation rate during a certain period such that the Alaskan Rule is vindicated. Indeed, the logic behind the Alaskan Rule is that in an economy of ups and downs, "it will all come out in the wash" — the interest rate and the inflation rate being, on the average, roughly equivalent. However, any standard which is inflexible in a dynamic economy will likely be unable to cope with the problem of preventing windfalls either to plaintiff or defendant. Although a perfect method may never be found, we must attempt to create standards that are fair to both sides of the controversy, with the trier of fact being allowed to receive and act upon credible evidence of the economic facts bearing, pro and con, on the competing theories.

The Amicus believes that the adoption by the Third Circuit of the total-offset method imposes by design an unfair economic penalty upon the defendant.

III. The Introduction Into Evidence of a General Rate of Future Inflation for the National Economy is Too Speculative to be Considered by the Fact Finder.

It is the position of the Amicus that a general pattern of inflation is still too remote, volatile, and speculative to be the subject of testimony from any trained economist. Recent economic news indicates a rate of inflation of only a few percentage points, but the percentage varies in each particular area. This compares favorably with the double-digit inflation which faced the country only two years ago. It could be pointed out that on the national level we have experienced steadily rising prices since the Second World War. However, the deflation of the Great Depression clearly shows that to assume continuing inflation over the next ten, twenty, thirty, or more years would be error. It is no surprise that the debate between trained economists over future inflationary trends continues to rage inconclusively at the national level.

As noted earlier, the Courts in the Sixth and Eighth Circuits believe that the evaluation of inflation should be left to the trier of fact based upon his or her common experience. Such a crystal ball guess is grossly unfair to all parties. The experience of any juror in dealing with inflation would be limited by that person's memory which might be confined only to recent years.

The very factors which might restrain or catalyze inflation are so myriad and hidden as to make unpredictable the rate of inflation only one year hence. As the Eighth Circuit in *Taenzler, supra,* stated, the prediction of future inflation at a specified rate is so speculative and uncertain that it would open up a trial to a plethora of collateral and remote considerations. Any prediction can only be done after the exploration of a number of experts' views on world finance and a clash of economic theories. It is the position of the Amicus that the craft and science of the economist has not advanced to the

point where one can forecast with any degree of certainty the existence of a specific nationwide rate of inflation over any long range period of time. Instead, economic and other experts should be used to show the possibility of income increases, whether through inflation or merit, within a particular job classification or a particular industry. However, that testimony should be limited solely to the specific job situation in which the plaintiff was employed and should not be permitted to extend into the highly speculative nature of nationwide future rates of inflation.

The recent decision in *Culver, supra,* outlined the problems of testimony specifying a general rate of inflation without reference to the particular plaintiff. Judge Brown said at page 296:

> In theory, the real rate of interest represents a possible standard for determining the proper and fair discount rate to be applied to damages resulting from the loss of future income. For courts using this method, the rate of inflation, however calculated, is subtracted from the interest rate for some relatively risk-free investment, and the remainder is the real rate of interest, or discount rate, to be applied to the damage award. In practice, of course, the problem becomes more difficult. Even where parties to a controversy are able to establish both a projected inflation rate and an interest rate on some risk-free investment, using legally acceptable indexes and tables, the fact remains that the goal of the exercise is to compensate the plaintiff for the income the worker would in all probability actually receive in future years. It is well-recognized that the average wage increases of many workers in the United States have not kept up consistently with inflation. This factor, then, must be applied to increase (e.g., from 2% to 4%) the discount rate so that the plaintiff, whose wages have not kept up and likely will

not keep up with inflation, will not receive increases based upon inflation. On the other hand, if the average annual increase in wages in a particular profession has risen above the inflation rate, the plaintiff should not be limited to increases based upon the inflation rate. This factor highlights the major weakness of the "real rate of interest" approach.

A simpler and more accurate approach to the problem is found where the plaintiff shows by expert testimony or otherwise, all of the increases in wages he is likely to receive during his work-life expectancy. Likely increases in wages due to cost of living increases, merit or productivity increases, or promotion increases could all be separately established by the plaintiff in computing the total amount of lost wages. For most occupations, it is easy to find economic data of general wage increases, which include increases due to cost of living, merit and productivity. The more difficult task of breaking down the data into the reasons for the increase, e.g. cost of living or merit increases, is not necessary in this simpler method. Then, the defendant has the opportunity to establish, by expert testimony or otherwise, the discount rate which reflects the rate of interest in a relatively safe investment, which is applied to the award to reduce it to present value. If the methodology is followed, the rate of inflation itself is not directly involved — inflation is only indirectly reflected (i) in the cost of living increases projected by the plaintiff (which may be more or less than the rate of inflation), and (ii) in the discount rate established by the defendant (which includes both the real rate of interest and the predicted effect of inflation). The result of such a calculation should not differ greatly from the result obtained through the *Feldman* approach. However, unlike the *Feldman* approach this alternative method would more accurately represent the future

wage lost by a particular plaintiff, in a particular occupation, in a particular geographic area.

The *Culver* decision supported each of its conclusions with reliable economic tables and evidence. This Court should rule that evidence concerning general inflationary trends or a specified general rate of inflation should not be allowed in any case involving a federal statute, and that all evidence concerning inflation and its effects on future loss of earnings should be confined to a particular plaintiff, in a particular occupation and in a particular geographic area.

IV. If the Fact of Inflation Is to Be Presented to the Fact Finder, the Method to Be Used Is That Adopted by the Ninth Circuit Court of Appeals in English, Supra, and Refined by the Fifth Circuit in Culver, Supra.

If this Court should agree that the fact of inflation is one which should be taken into consideration by the fact finder, then the method adopted by the United States Court of Appeals for the Ninth Circuit in *English, supra*, and the recent refinements discussed by the Fifth Circuit in *Culver, supra*, should receive the express approval of the Court. Together, those decisions make two large improvements over the method adopted by the Third Circuit in the *Pfeifer* case. First, they hold that a court must discount a verdict to present worth. These cases are, therefore, in conformity with the decision of this Court in *Chesapeake, supra*, by requiring that such a reduction be made. Secondly, both decisions require that competent economic evidence be introduced on the subject of future inflation, as it might effect the particular plaintiff and his particular situation. Any estimate of inflation must be supported by sound and substantial evidence. Moreover, neither case permits that unfettered discretion by the jury which the Sixth Circuit allowed in *Bach, supra*, and the Eighth Circuit sanction in *Riha*,

supra. No burden then is placed upon a trial judge to second guess a jury as to how it arrived at its verdict, and the use of the power of a remittitur to bring a verdict within reasonable boundries is not encouraged.

The real problem with the instant case is its complete exclusion of expert testimony as to inflation. As noted earlier in Section II, there is always a difference between the rate of inflation and the rate of interest, even though the two may tend to move in a non-parallel fashion in the same direction. The trier of fact, aided by competent testimony concerning the percentage most particularly relevant to the plaintiff in his or her occupation and region, must be allowed to identify the most appropriate discount factor to reduce the verdict to present value. The Amicus disagrees with the theory, now adopted by the Second Circuit in the case of *Doca, supra*, which approved a specific discount factor of 2% to be applied to all cases. The Amicus believes that the discount value in each individual case should be established through expert testimony. Furthermore, the trier of fact, by the use of a specially tailored verdict sheet, should be required to show how it arrived at any particular discount factor. Judge Brown in *Culver, supra*, at page 306, outlined a jury's various calculations in reaching a verdict. The soundness of Judge Brown's approach is recommended to the Court.

The Amicus strongly believes that the prediction of specific inflation rates for the country as a whole should not be permitted. However, if such general predictions are made, they must relate to the potential losses of the particular plaintiff's future earning capacity as opposed to economic society in general. In *Vesey v. United States*, 626 F.2d 627 (9th Cir. 1980), the Ninth Circuit held that since evidence as to general inflationary trends had never been related to the components of the claimant's future earnings, the trial court properly refused to accept any general inflation factor to increase the verdict. This Court should bar speculation as to national in-

flationary trends. However, if it believes that such testimony is needed, the Court should confine the economic expert's testimony to the industry or type of work which the claimant was performing. As the Fifth Circuit said in *Culver, supra*, expert testimony as to inflationary trends must be confined to the particular plaintiff working in a particular job in a particular industry in a particular geographical location. By such testimony, tailored to the case at hand, the trier of fact would have a reliable method of reaching an accurate verdict while avoiding the possibility of either an inadequate verdict or a windfall for the plaintiff.

This Court, in the *Norfolk* case, an action under the Federal Employers' Liability Act brought in a state court, ruled that the question concerning the measure of damages in a case under a federal statute is federal in character. It is necessary in cases involving federal statutes that a single method of considering inflation be adopted since the measurement of damages should be uniform throughout the Federal Courts. However, the methods now used by the various circuits will lead to substantially varying results. The Amicus urges the method adopted by the Ninth Circuit in *English, supra*, as modified by the Fifth Circuit in *Culver, supra*, as the best method which protects all of the parties involved.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit in the *Pfeifer* case is in error in that it applied the total offset method of calculating future loss of earnings and failed to reduce the verdict to present worth. This method is in conflict with the decision of the United States Supreme Court in *Chesapeake, supra*, since it systematically overcompensates a claimant. This inequitable result must be corrected by this Court's reversal of the decision of the United States

Court of Appeals for the Third Circuit with proper guidelines to be followed by all Federal Courts in the calculation of future loss of earnings under federal statutes.

Respectfully submitted,

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OCTOBER TERM, 1982

JONES & LAUGHLIN STEEL CORPORATION, PETITIONER

v.

HOWARD E. PFEIFER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether the court of appeals properly refused to discount to present value a damages award for lost future earnings on the assumption that inflation completely offsets the discount rate.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-131

JONES & LAUGHLIN STEEL CORPORATION, PETITIONER

v.

HOWARD E. PFEIFER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

The United States has a direct interest in the proper interpretation and administration of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.* The refusal of the court of appeals in this case to discount to present value a damages award for lost future earnings results in an unwarranted windfall for plaintiffs under Section 5(b) of the LHWCA, 33 U.S.C. 905(b). The decision, moreover, may well have an impact on the computation of damages awards under other federal statutes, notably the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Although damages awards under the FTCA are based

on state rather than federal law, the decision below, if affirmed by this Court, may well serve as precedent for state and federal courts deciding cases under the FTCA. See, *e.g.*, *Barnes* v. *United States*, 685 F.2d 66, 70 (3d Cir. 1982) ("total offset" method is not punitive and therefore may be utilized under the FTCA, 28 U.S.C. 2674) (citing decision in this case).

STATEMENT

Respondent Howard E. Pfeifer instituted this action under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(b), against his employer, petitioner Jones & Laughlin Steel Corporation, for injuries he sustained after falling on the deck of a coal barge owned by Jones & Laughlin (Pet. App. 2a). Pfeifer had previously claimed and received workers' compensation payments under the LHWCA (*id.* at 37a). The district court found that Jones & Laughlin was negligent in its maintenance of the barge and that this negligence was the proximate cause of Pfeifer's injury (*id.* at 2a-3a). Petitioner did not challenge these findings on appeal, but rather asserted that Section 5(a) of the LHWCA pretermitted a negligence action brought by an employee against his employer (*ibid.*). The court of appeals, concluding that it remained bound by this Court's decision in *Reed* v. *The Yaka*, 373 U.S. 410 (1963), held that Section 5(a) "does not bar a suit against an owner *pro hac vice* [of a vessel] who also is an employer liable for compensation" (Pet. App. 4a).[1]

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[1] The first question presented by petitioner to this Court is whether Section 5(b) permits an employee to bring a third-party negligence action against his or her employer. Although the United States takes no position on this question, we note that legislation currently pending before Congress would

On the issue of damages, Pfeifer contended that the impact of inflation must be considered in calculating his lost future wages, and he therefore submitted evidence regarding anticipated wage increases until his presumed date of retirement (Pet. App. 41a). Rather than estimating the anticipated effects of inflation on Pfeifer's lost earning capacity, however, the district court adopted the "total offset" rule announced by the Pennsylvania Supreme Court in *Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980), and simply refused to reduce Pfeifer's estimated future earnings to present value, on the theory that inflation would "totally offset" the discount rate (Pet. App. 41a-43a).

The court of appeals affirmed (Pet. App. 1a-16a). The court recognized that, under general federal maritime law, a seaman "injured by the tortious conduct of his employer is entitled to an award of damages commensurate with the nature and extent of his injuries. He is entitled to reimbursement for his loss of earnings, past and prospective; for any impairment of his earning capacity; for medical expenses incurred and to be incurred; and for any other economic loss he may have sustained or is likely to sustain" (*id.* at 13a). The court also recognized that inflation has not "been only a temporary phenomenon on the American scene" (*ibid.*) and must therefore be taken into account in calculating damage awards. Because of the "speculative nature of predicting future inflationary trends" (*id.* at 14a), however, the court concurred in the district court's use of the "total

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amend Section 5(b) to bar negligence actions brought by shipyard employees against their employers. See S. Rep. No. 97-498, 97th Cong., 2d Sess. 4, 19, 31-33 (1982); 128 Cong. Rec. S9213 (daily ed. July 27, 1982).

offset" method. "The total offset method avoids the danger of speculating as to the future rate of inflation by making what we consider a very sensible accommodation: it assumes that in the long run the effects of future inflation and the discount rate will co-vary significantly with the other" (*id.* at 15a). The court concluded that pragmatic considerations justify the assumption underlying the "total offset" method. " 'Litigators are freed from introducing and verifying complex economic data. Judge[s] and juries are not burdened with complicated, time consuming economic testimony. Finally, by eliminating the variables of inflation and future interest rates from the damage calculation, the ultimate award is more predictable' " (*ibid.*, quoting *Kaczkowski* v. *Bolubasz*, *supra*, 491 Pa. at 583, 421 A.2d at 1038).

SUMMARY OF ARGUMENT

The decision of the court of appeals ignores economic reality and unfairly penalizes defendants by overcompensating plaintiffs for the future effects of inflation. The "total offset" rule adopted below assumes, contrary to all sound economic theory, that the future earning power of a damages award will be completely eroded by inflation. In fact, economic theory indicates that a plaintiff can invest a damages award at a rate of interest that exceeds the expected rate of inflation by several percentage points. Therefore, this "real" rate of return (*i.e.*, the interest earned after compensating for inflation) must be considered by a court in discounting a lump sum damages award to present value.

There are at least two methods by which the impact of inflation on a damages award may be properly ascertained. A court may compute lost future earnings without considering inflation, and then discount that

sum by a factor that also disregards inflation—*i.e.*, the "real" interest rate. Alternatively, a court may calculate the expected impact of inflation on lost future earnings and then discount that inflated sum by the prevailing interest rate. Either approach, contrary to the "total offset" method adopted below, fairly compensates plaintiffs for the effects of inflation without unfairly penalizing defendants.

ARGUMENT

THE "TOTAL OFFSET" RULE ADOPTED BY THE COURT OF APPEALS IS CONTRARY TO SOUND ECONOMIC THEORY AND IS AN INACCURATE METHOD OF CALCULATING THE IMPACT OF INFLATION ON DAMAGES AWARDS

The "total offset" rule adopted by the court of appeals is not supported by sound economic theory and clearly overcompensates a plaintiff for the effects of inflation. While federal courts should not ignore the impact of inflation on damages awards, neither should they adopt a rule that systematically overcompensates plaintiffs and penalizes defendants. As the Fifth Circuit recently noted, "the problem is one of fairness to plaintiffs as well as defendants in the trial process. * * * Quite simply, plaintiffs are to be compensated, by a culpable tortfeasor, but should not be over- or under-compensated. Likewise, defendants found liable should pay no more or less than the amount a plaintiff lost because of the injury." *Culver* v. *Slater Boat Co.*, 688 F.2d 280, 286 (5th Cir. 1982) (en banc).

1. The objective of a compensation award is to "place the plaintiff in the same economic position as would have been his if the injury had not occurred." *Russell* v. *City of Wildwood*, 428 F.2d 1176, 1181 (3d Cir. 1970). See also *Norfolk W. Ry.* v. *Liepelt*,

444 U.S. 490, 493 (1980). Personal injury awards, however, once they have been calculated on the basis of projected lost income and life expectancy, are paid immediately to the plaintiff. *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 286. Because of the "earning power of the money that is presently to be awarded" (*Chesapeake & O. Ry.* v. *Kelly*, 241 U.S. 485, 489 (1916)), this Court has traditionally required that the award be discounted to "present cash value." *Ibid.*; *Norfolk & W. Ry.* v. *Liepelt*, *supra*, 444 U.S. at 494. That is, a court generally awards the plaintiff the amount of money that, if safely invested, will yield the total estimated damages during the time frame of the award. "Consequently, the law traditionally permits introduction of testimony, usually by an expert in financial matters, that the lump-sum should be discounted by a factor equal to the interest rate which could likely be earned on a relatively safe investment by an unsophisticated investor. The total projected earnings are thus reduced to the present cash value." *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 286.[2]

The traditional approach to damages calculation, where a court estimates future income losses based on present earnings and then discounts the resulting sum to present value, works well without further adjustment during periods of economic stability. The plaintiff is assured of receiving fully compensatory damages while the defendant's burden is reduced in proper proportion to the earning power of the sum

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[2] For example, if a plaintiff's projected lost earnings over ten years were calculated at $10,000 per year or $100,000, courts have not traditionally awarded the plaintiff $100,000, but rather the sum of money that would yield $10,000 per year during the ten-year period of the award. See *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 286-287.

paid to the plaintiff. *Chesapeake & O. Ry.* v. *Kelly*, *supra*, 241 U.S. at 489. Unfortunately, however, the economy in recent years has been far from stable. The traditional method for computing damages awards, moreover, has not always accounted adequately for persistent inflationary trends in the national economy. Some courts have had difficulty estimating future earnings because of inflationary pressures (see, *e.g.*, *Williams* v. *United States*, 435 F.2d 804, 807 (1st Cir. 1970)); a bewildering rise in interest rates has left other courts unsure about proper application of discount rates (see, *e.g.*, *Kaczkowski* v. *Bolubasz*, 491 Pa. 561, 583, 421 A.2d 1027, 1038 (Pa. 1980)). But, while the problems are real, clear solutions are emerging from the lower federal courts.

Accounting for the future effects of inflation on damages awards "is really an economic, and not a legal, problem." *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 286. Faced with the task of adjusting damages awards in an inflationary economy, federal courts have developed several methods for fully compensating a plaintiff without overcharging a defendant.[3] See, *e.g.*, *Culver* v. *Slater Boat Co.*, *supra*; *O'Shea* v. *Riverway Towing Co.*, 677 F.2d 1194 (7th Cir. 1982); *Doca* v. *Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981); *Steckler* v. *United States*, 549 F.2d 1372 (10th Cir. 1977); *United States* v. *English*, 521 F.2d

[3] The First Circuit apparently stands alone in its refusal to consider the effects of inflation on damages awards, principally on the theory that estimates of future inflation are too speculative to serve as a basis for calculating damages. *Williams* v. *United States*, 435 F.2d 804, 807 (1970). The Fifth Circuit originally took that position (*Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (1975) (en banc)), but recently reversed itself in *Culver* v. *Slater Boat Co.*, *supra*.

63 (9th Cir. 1975); *Riha* v. *Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975); *Morvant* v. *Construction Aggregates Corp.*, 570 F.2d 626 (6th Cir.), cert. dismissed, 439 U.S. 801 (1978).[4] Unlike the court below, which resorted to the inflexible and wooden "total offset" method, these courts have attempted to "achieve a realistic estimate of future conditions, so that an injured plaintiff can be compensated for his loss as fairly and completely as possible." *Doca* v. *Marina Mercante Nicaraguense, S.A.*, *supra*, 634 F.2d at 38.

2. Although some details regarding proof and trial procedure may differ among the circuits,[5] the courts

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[4] Three of the above cases, *United States* v. *English*, *Steckler* v. *United States*, and *Riha* v. *Jasper Blackburn Corp.*, did not technically involve federal law damages computation issues. *English* and *Steckler* arose under the Federal Tort Claims Act, in which local law is applied. *Riha* was a diversity case applying Nebraska law. In all three cases, however, the relevance of inflation was considered in light of general principles.

[5] Most federal courts permit expert testimony regarding the anticipated effects of inflation on a damages award. See, *e.g.*, *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 298; *O'Shea* v. *Riverway Towing Co.*, *supra*, 677 F.2d at 1200; *Doca* v. *Marina Mercante Nicaraguense, S.A.*, *supra*, 634 F.2d at 39; *Morvant* v. *Construction Aggregates Corp.*, *supra*, 570 F.2d at 632-633; *Steckler* v. *United States*, *supra*, 549 F.2d at 1378; *United States* v. *English*, *supra*, 521 F.2d at 75-76. Some courts permit juries to consider inflation in calculating damages on the theory that inflation "is a fact of life within the common experience of all jurors," but prohibit expert testimony regarding inflation because of the imprecision of such evidence. *Riha* v. *Jasper Blackburn Corp.*, *supra*, 516 F.2d at 845 (based on court's reading of Nebraska state law). This second position is decidedly a minority viewpoint, and apparently has been rejected by the first federal court to have articulated it. Compare *Bach* v. *Penn Central Transportation Co.*, 502 F.2d

of appeals have developed two general approaches in dealing with the impact of inflation upon the present value of lost future wages. Judge Posner's opinion for the Seventh Circuit in *O'Shea* v. *Riverway Towing Co.*, *supra*, and Judge Brown's opinion for the en banc Fifth Circuit in *Culver* v. *Slater Boat Co.*, *supra*, set out in detail these two approaches. Basically, the first method requires a court to "take [inflation] out of both the wages and the discount rate," while the second involves use of a prevailing market discount rate applied "to an estimate of lost future wages that includes expected inflation." *O'Shea* v. *Riverway Towing Co.*, *supra*, 677 F.2d at 1199. See also *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d 295-299. Both of these methods adequately compensate a plaintiff for the effects of inflation, and neither exacts an unfair penalty from the defendant.

The first method relies upon what can be termed the "real interest rate." "In layman's terms, the real rate of interest mirrors the rate of interest that lenders would charge in an inflationless society." *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 295.

1117, 1122 (6th Cir. 1974) (permitting jury to consider inflation but excluding expert testimony), with *Morvant* v. *Construction Aggregates Corp.*, 570 F.2d 626, 632-633 (6th Cir.), cert. dismissed, 439 U.S. 801 (1978) (reversing lower court for excluding expert evidence regarding the expected impact of inflation). Whatever the methodology for considering inflationary pressures, however, the courts uniformly require that the damages award be reduced to present value. *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 302-306; *O'Shea* v. *Riverway Towing Co.*, *supra*, 677 F.2d at 1200; *Doca* v. *Marina Mercante Nicaraguense, S.A.*, *supra*, 634 F.2d at 39; *Morvant* v. *Construction Aggregate Corp.*, *supra*, 570 F.2d at 631; *Steckler* v. *United States*, *supra*, 549 F.2d at 1378; *United States* v. *English*, *supra*, 521 F.2d at 75; *Riha* v. *Jasper Blackburn Corp.*, *supra*, 516 F.2d at 843.

In reliance on expert economic opinion, the Seventh Circuit has concluded that when no inflation is anticipated, the "real" interest rate is between 1% and 3%. *O'Shea* v. *Riverway Towing Co., supra*, 677 F.2d at 1199. See also *Doca* v. *Marina Mercante Nicaraguense, S.A.*, 634 F.2d at 39 n.10 ("there is substantial opinion that during periods of stable rates of inflation, the real yield of money, whether constant or slightly fluctuating, is approximately 2%"); I. Fisher, *The Theory of Interest* 43 (1930); R. Posner, *Economic Analysis of Law* 78-82 (1973); P. Samuelson, *Economics* 271-273 (9th ed. 1973). Interest rates are higher than this "real" rate only "because of the expectation of inflation and the uncertainty as to its extent." *Culver* v. *Slater Boat Co., supra*, 688 F.2d at 295. The real rate of interest, moreover, presents a fair standard for computing lost future wages during inflationary periods because, as the Seventh Circuit stated, it can be utilized to "take [inflation] out of both the wages and the discount rate." *O'Shea* v. *Riverway Towing Co., supra*, 677 F.2d at 1199.

Under this method, future wages are calculated on the assumption that there will be zero inflation. Then, to be consistent, the "real" interest rate rather than the inflated actual interest rate is applied to that sum to reduce it to present value. Both the Seventh and Second Circuits have suggested use of a 2% discount rate for this purpose. *O'Shea* v. *Riverway Towing Co., supra*, 677 F.2d at 1199; *Doca* v. *Marina Mercante Nicaraguense, S.A., supra*, 634 F.2d at 39. This method adequately compensates a plaintiff for the effects of future inflation because the award will not be invested at a mere 2%, but rather at "the much higher prevailing interest rate." *O'Shea* v.

Riverway Towing Co., *supra*, 677 F.2d at 1199. The difference between the 2% discount rate (*i.e.*, the "real" rate of interest) and the actual prevailing interest rate at which the award will be invested reflects inflationary expectations in the economy and enables the plaintiff to replace lost earnings "with an amount equal to what [he or] she would in fact have earned in that year if inflation continues, as most people expect it to do" (*ibid.*). See also Note, *Considering Inflation in Calculating Lost Future Earnings*, 18 Washburn L.J. 499, 510 (1979) ("Discounting at the real interest rate rather than the nominal interest rate awards plaintiff a lump sum which when invested compensates for future decreases in the dollar's value"). See also *Feldman* v. *Allegheny Airlines, Inc.*, 524 F.2d 384 (2d Cir. 1975).

The second method for dealing with inflationary pressures on lost future earnings differs somewhat in methodology, but not appreciably in result, from the method just outlined. The second method requires a court to calculate lost future wages on the basis of expected inflation, and then discount that amount by a figure that likewise includes expected inflation. Under this method, the plaintiff shows "all of the increases in wages he is likely to receive" during the time period of the damage award. *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 298. "Then, the defendant has the opportunity to establish, by expert testimony or otherwise, the discount rate which reflects the rate of interest in a relatively safe investment, which is applied to the award to reduce it to present value." *Ibid.* Although prediction of future inflation rates may at first appear cumbersome and speculative, this approach does not require "gazing into a crystal ball." *O'Shea* v. *Riverway Towing Co.*,

supra, 677 F.2d at 1199. "The expected rate of inflation can * * * be read off from the current long-term interest rate. If that rate is 12 percent, and if as suggested earlier the real or inflation-free interest rate is only one to three percent, this implies that the market is anticipating 9-11 percent inflation over the next 10 years, for a long-term interest rate is simply the sum of the real interest rate and the anticipated rate of inflation during the term." *Ibid.*

Either of the two preceding methods is an acceptable—and relatively accurate—means of accounting for the impact of inflation on an award of lost future earnings. The first method assumes zero inflation in estimating future lost wages, but likewise assumes zero inflation in reducing the resulting award to present value. The second method allows a plaintiff the opportunity to show just what the predictable impact of inflation on his or her future earnings would be, while allowing the defendant to reduce that calculation to present value on the basis of current, inflated interest rates. Both methods treat the plaintiff and defendant fairly, both are based on sound economic theory, and neither presents insurmountable evidentiary or procedural obstacles for the district courts. See generally *O'Shea* v. *Riverway Towing Co.*, *supra*, 677 F.2d at 1199-1200; *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 302-306. See also *Norfolk & W. Ry.* v. *Liepelt*, *supra*, 444 U.S. at 494.[6]

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[6] We do not suggest that the Court, at this time, adopt one of the above two methods to the exclusion of the other. The law in this area is still developing, and further experience in the district courts and courts of appeals is vital in determining the respective merits of each of the above approaches. See generally *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d 295-

3. In contrast with the above methods, the "total offset" approach adopted by the court below is not founded on any valid economic theory and routinely penalizes defendants by overcompensating plaintiffs for the effects of inflation. See, *e.g.*, I. Fisher, *The Theory of Interest* 43 (1930); R. Posner, *Economic Analysis of Law* 78-82 (1973); Note, *supra*, 18 Washburn L.J. at 509. Moreover, the sole justification for the rule—judicial efficiency—is insufficient to validate its ill effects.

As stated by the court below, the "total offset" rule rests solely on what it termed "a very sensible accommodation" (Pet. App. 15a). The rule "assumes that in the long run the effects of future inflation and the discount rate will co-vary significantly with the other" (*ibid.*). That is, a court applying the "total offset" rule must assume that the inflation rate will totally negate "the earning power of the money that is presently to be awarded." *Chesapeake & O. Ry.* v. *Kelly*, *supra*, 241 U.S. at 489. This "sensible accommodation," however, is clearly irrational, as it proceeds upon the premise that lenders expect no net return on their capital. Such an assumption is contrary to all accepted economic theory. I. Fisher, *The Theory of Interest* 43 (1930); R. Posner, *Economic Analysis of Law* 78-82 (1973).

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302. Importantly, the federal courts that have addressed these issues have not required inflexible use of one or the other computation methods. *Id.* at 299 n.23; *Doca* v. *Marina Mercante Nicaraguense, S.A.*, *supra*, 634 F.2d at 39; *O'Shea* v. *Riverway Towing Co.*, *supra*, 677 F.2d at 1200. There is, moreover, some continuing debate regarding the relative superiority of one or the other of the methods described above. See, *e.g.*, *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 302. Compare *id.* at 311-313 (Hill, J., concurring in part and dissenting in part).

As recognized by courts in at least three circuits, the "risk free" or "real" interest rate "is between one and three percent." *O'Shea* v. *Riverway Towing Co.*, *supra*, 677 F.2d at 1199. Accord, *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 296-297; *Doca* v. *Marina Mercante Nicaraguense, S.A.*, *supra*, 634 F.2d at 39. That is, lenders are willing to make loans during periods of zero inflation at between 1% and 3% interest. "Additional percentage points above that level reflect inflation anticipated over the life of the loan." *O'Shea* v. *Riverway Towing Co.*, *supra*, 677 F.2d at 1199. Thus, the future earning power of a damages award is not completely "netted out" or "offset" by inflation—the money can be safely invested at a rate that will compensate for future inflation as well as return a "real" profit of between 1% and 3%. I. Fisher, *The Theory of Interest* 43 (1930); R. Posner, *Economic Analysis of Law* 78-82 (1973).

Because of the clear economic fallacy upon which the "total offset" rule is predicated, no court of appeals had sanctioned use of the rule until the decision of the Third Circuit in this case. See, *e.g.*, *United States* v. *English*, *supra*, 521 F.2d at 75 ("By today's holding that the trier of facts in awarding damages may take into consideration estimated changes in the purchasing power of money, we do *not* mean to imply that the lower court may use our holding as an excuse not to discount an award to its net present value") (emphasis in original). But see *Freeport Sulphur Co.* v. *S/S Hermosa*, 526 F.2d 300, 309-310 (5th Cir. 1976) (Wisdom, J., concurring) (suggesting use of "total offset" method, with the caveat that discounting an award by the "real" rate of interest "would provide more exact compensation"). The Fifth Circuit has noted that the total offset "unnecessarily penalizes defendants because

* * * interest rates on relatively safe investments will typically ride several percentage points above the rate of inflation." *Culver* v. *Slater Boat Co., supra*, 688 F.2d at 299. Even the Third Circuit has recognized that "the total offset method may not conform precisely to economic reality." *Barnes* v. *United States*, 685 F.2d 66, 70 (1982). While the damages calculation methods outlined in section two of this brief may not perfectly account for the impact of inflation in all cases,[7] they do attempt reasonably and fairly to predict the amount of money that will make a plaintiff whole without penalizing a defendant. It is simply "illogical and indefensible" (*O'Shea* v. *Riverway Towing Co., supra*, 677 F.2d at 1200) to require a defendant to pay the entire, undiscounted lump sum of estimated lost future earnings on the erroneous assumption that inflation will totally cripple the earning power of that award. This Court's vintage precedent in *Chesapeake & O. Ry.* v. *Kelly, supra*, requires reversal of the decision below, because a federal court may not totally disregard the "earning power" of a damages award. 241 U.S. at 489.[8]

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[7] Discounting by the "real" rate of interest may not be as precise as adjusting future income in light of anticipated inflation and then discounting by the prevailing market interest rate. See, *e.g.*, *Culver* v. *Slater Boat Co., supra*, 688 F.2d at 296-298, 302; Note, *supra*, 18 Washburn L.J. at 507 n.114.

[8] Contrary to the assertion of the court below, the "total offset" method does not "bid[] fealty to the concept of reducing future earnings to present worth" (Pet. App. 15a). Instead, the method assumes as a matter of law that inflation completely cancels out the future earning capacity of a damages award. Such an assumption not only flies in the face of all sound economic theory (Note, *supra*, 18 Washburn L.J. at 509), it is a matter particularly inappropriate for resolution as a question of law. As noted by the Fifth Circuit, adjusting an award to compensate for the effects of inflation

The sole justification advanced by the court below for the "total offset" method is the fact that it contributes to " 'judicial efficiency' " (Pet. App. 15a, quoting *Kaczkowski* v. *Bolubasz*, *supra*, 491 Pa. at 583, 421 A.2d at 1038). But freeing judges, juries and litigators from sometimes complicated economic calculations does not validate the patent unfairness of the "total offset" method. In *Norfolk & W. Ry.* v. *Liepelt*, *supra*, 444 U.S. at 494, the Court wrote that "future inflation" was a matter of "estimate and prediction" that "might provide the basis for protracted expert testimony and debate." Nevertheless, this fact alone is not sufficient to preclude judges and juries from considering and utilizing such evidence. "[T]he practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life." *Ibid.* Inflation is one of the "complexities of modern life" with which judges and jurors have indeed become increasingly familiar during recent years. The pragmatic consideration of judicial efficiency—while of some importance—does not justify adoption of a rule of law that ignores economic reality solely to avoid presenting judges and juries with "the essential elements of an expert calculation" (*ibid.*).[9]

"is really an economic, and not a legal, problem." *Culver* v. *Slater Boat Co.*, *supra*, 688 F.2d at 286. Even assuming, arguendo, that economic conditions in 1982 result in inflation completely offsetting the earning power of capital, a court would hardly be justified in concluding that such an unusual scenario will continue indefinitely, regardless of future factual developments.

[9] The "total offset" method, moreover, does not make calculation of a damages award " 'more predictable' " (Pet. App.

Far from an analysis that is "coherent and consistent with the elements of damages discussed in previous case law" (Pet. App. 15a), the "total offset" method is in reality a rigid, wooden, per se rule that ignores both theoretical and actual economic conditions. It must, therefore, as a matter of fairness, be rejected by this Court. "[A]ny standard which is inflexible in a dynamic economy will likely be unable to cope with the problem of preventing windfalls either to plaintiff or defendant. Although a perfect method may never be found, we must attempt to create standards that are fair to both sides of the controversy * * *." *Culver* v. *Slater Boat Co., supra,* 688 F.2d at 300.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1982

15a, quoting *Kaczkowski* v. *Bolubasz, supra,* 491 Pa. at 583, 421 A.2d at 1038). The approach "ignores rather than enhances predictability. As no sound economic theory supports total offset, the [total offset method] fails to resolve the speculation inherent in economic forecasting." Note, *supra,* 18 Washburn L.J. at 509 (footnotes omitted).

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CASE NBR 82-1-00131 CFX
SHORT TITLE Jones & Laughlin Steel Corp. DOCKETED: Jul 14 1982
VERSUS Pfeifer, Howard E.

Date	Proceedings and Orders
Jul 14 1982	Petition for writ of certiorari filed.
Aug 9 1982	Brief of respondent Howard E. Pfeifer in opposition filed.
Aug 17 1982	Motion of Keystone Shipping Company, et al. for leave to file a brief as amici curiae filed.
Aug 18 1982	DISTRIBUTED. September 27, 1982
Oct 4 1982	Motion of Keystone Shipping Company, et al. for leave to file a brief as amici curiae GRANTED.
Oct 4 1982	The petition for a writ of certiorari is granted limited to Questions I and II presented by the petition.
Nov 17 1982	Brief amicus curiae of United States filed.
Nov 18 1982	Motion of Southeastern Pennsylvania Transportation Authority for leave to file a brief as amicus curiae filed.
Nov 18 1982	Joint appendix filed.

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PROCEEDINGS AND ORDERS DATE: 030283

CASE NBR 82-1-00131 CFX
SHORT TITLE Jones & Laughlin Steel Corp. DOCKETED: Jul 14 1982
VERSUS Pfeifer, Howard E.

Date	Proceedings and Orders
Nov 18 1982	Brief of petitioner Jones & Laughlin Steel Corp. filed.
Nov 22 1982	Motion of Alcoa Steamship Company, Inc., et al. for leave to file a brief as amici curiae filed.
Nov 29 1982	Motion of Southeastern Pennsylvania Transportation Authority for leave to file a brief as amicus curiae GRANTED.
Dec 6 1982	Motion of Alcoa Steamship Company, Inc., et al. for leave to file a brief as amici curiae GRANTED.
Dec 5 1982	Motion of petitioner and amici curiae Alcoa Steamship Company, Inc., et al. for additional time for oral argument filed.
Dec 5 1982	Motion of amici curiae Alcoa Steamship Company, Inc., et al. for divided argument filed.
Dec 9 1982	Opposition of respondent to motion of petitioner and amici curiae Alcoa Steamship Company, Inc., et al. for

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Date	Proceedings and Orders
Dec 9 1982	Opposition of respondent to motion of petitioner and amici curiae Alcoa Steamship Company, Inc., et al. for additional time for oral argument filed.
Dec 9 1982	Opposition of respondent to motion of amici curiae Alcoa Steamship Company, Inc., et al. for divided argument filed.
Dec 13 1982	Motion of petitioner and amici curiae Alcoa Steamship Company, Inc., et al. for additional time for oral argument DENIED.
Dec 13 1982	Motion of amici curiae Alcoa Steamship Company, Inc., et al. for divided argument DENIED.
Dec 17 1982	Motion of International Longshoremen's and Warehousemen's Union for leave to file a brief as amicus curiae filed.
Dec 17 1982	Brief of respondent Howard E. Pfeifer filed.

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PROCEEDINGS AND ORDERS DATE: 030283

CASE NBR 82-1-00131 CFX
SHORT TITLE Jones & Laughlin Steel Corp. DOCKETED: Jul 14 1982
VERSUS Pfeifer, Howard E.

Date	Proceedings and Orders
Jan 3 1983	CIRCULATED.
Jan 10 1983	Motion of International Longshoremen's and Warehousemen's Union for leave to file a brief as amicus curiae GRANTED.
Jan 14 1983	Record filed.
Jan 14 1983	Certified copy of appendix & partial proceedings received.
Jan 19 1983	SET FOR ARGUMENT, Monday, February 28, 1983. (2nd case)
Feb 28 1983	ARGUED.